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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-200

No. ~~1742~~

UNION CARBIDE CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Petitioner, Union Carbide Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit granting enforcement, in part, of an order of Respondent, the National Labor Relations Board.

CITATIONS TO OPINIONS BELOW

The decision and order of the Respondent, and the findings and conclusions of the Trial Examiner, which Respondent's decision and order substantially adopted are reported in 174 NLRB No. 147(1969). The decision of the United States Court of Appeals for the Fourth Circuit has not yet been reported. The findings and conclusions of the Trial Examiner, the decision and

order of the Respondent, and the opinion of the United States Court of Appeals for the Fourth Circuit are printed in Appendix A, hereto, infra p. 1a.

JURISDICTION

The decision of the Circuit Court of Appeals was entered on January 5, 1971. Rehearing was denied on February 23, 1971. The judgment of the Court of Appeals was entered on March 2, 1971. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1) and 29 U.S.C. Section 160(e).

QUESTIONS PRESENTED

(1) Whether an employee engages in protected concerted activity when he individually refuses to cross a picket line maintained at his place of work by a labor organization, of which he is not a member, representing employees in a separate bargaining unit, in connection with an economic strike in which he is not directly involved.

(2) Whether economic strikers, whose jobs have been absorbed by employees who continue working during the strike, have been "discharged", and are thus entitled to reinstatement; or have been "replaced", and are, therefore, not entitled to reinstatement.

STATUTES INVOLVED

29 U.S.C. Section 158 (a) (1) reads: "(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . ."

29 U.S.C. Section 157 reads: "Employees shall have the right to self-organization, to form, join, or assist

labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title."

STATEMENT OF THE CASE

The employees in Petitioner's Construction Department constitute a bargaining unit separate from the production and maintenance employees at Petitioner's chemical plant. The employees in the Construction Department are not represented by any labor organization, and their terms and conditions of employment are not prescribed by a collective bargaining agreement. The employees in the production and maintenance unit are represented by a labor organization, and their terms and conditions of employment are fixed by collective bargaining contracts.

The labor organization representing the production and maintenance employees, and the employees in that unit, engaged in a lawful economic strike in support of collective bargaining for a new contract. The striking employees and their union picketed the plant. Two employees of the separate Construction Department, acting individually and for reasons of personal principle, refused to cross the picket line and perform work to which they had been assigned. The work consisted of their normal duties and was not "struck" work. Pursuant to an earlier announced policy adopted

for bona-fide business reasons, Petitioner discharged the employees when they continued to refuse to work.

The work which the discharged employees had performed was diminishing, and their work was absorbed by the remaining Construction Department employees, who continued working. Upon conclusion of the strike, diminishing work requirements and a consequently reduced work force left no vacancies for the discharged employees. Therefore, neither was offered reinstatement, and one who applied for reinstatement was refused.

Upon investigation of Unfair Labor Practice charges filed by the discharged employees, the General Counsel of the Board issued a complaint charging that Petitioner's conduct in threatening to discharge, and discharging, the two employees, and failing to reinstate them, constituted an unfair labor practice as defined by Section 8(a)(1) and 8(a)(3) of the Labor Relations Act (the Act), 29 U.S.C. 158(a)(1) and (3). Upon hearing, the Trial Examiner sustained the charges and recommended that the employees be reinstated with back pay. His findings and recommendations were adopted by the Board, with the exception that the Board made no finding with regard to any violation of Section 8(a)(3) of the Act. The Board entered an order requiring reinstatement of the employees, with back pay.

Upon Petitioner's failure to comply with that order, the Board applied to the United States Court of Appeals for the Fourth Circuit for enforcement under 29 U.S.C. Section 160(e). The Circuit Court of Appeals granted enforcement of the Board's order, holding that the employees who refused to cross the picket line as a

matter of principle[1] were engaging in activity protected by Section 7 of the Act; and (with Judge Bryan's dissent) that the fact that their jobs were absorbed by the remaining work force, so that there was no need to rehire them, did not excuse the Petitioner's failure to reinstate them. Rehearing was denied (also over Judge Bryan's dissent).

This petition for certiorari seeks reversal of the decision of the Court of Appeals; and remand for the entry of an order denying enforcement of the Board's order.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals for the Fourth Circuit in the instant case, and the similar decisions of the Fifth Circuit in *NLRB* v. *Southern Greyhound Lines,* 426 F.2d 1299 (5th Cir.) (relied upon by the Fourth Circuit Court of Appeals in this case), and the Sixth Circuit, in *NLRB* v. *Difco Laboratories, Inc.,* 427 F.2d 170 (6th Cir.), are in conflict with the decisions of the Court of Appeals for the Seventh Circuit in *NLRB* v. *Illinois Bell Telephone Co.*; 189 F.2d 124 (7th Cir.); Cert. den. 342 U.S. 885, and the Eighth Circuit, in *NLRB* v. *L. G. Everist, Inc.,* 334 F.2d 312 (8th Cir.). The Court of Appeals for the Fifth Circuit, in *NLRB* v. *Southern Greyhound Lines, supra,* recognized that there exists a conflict among the Circuits respecting the question, when it said:

> "The relative rights and duties of an employee who refuses to cross a picket line and his employer who would require such a crossing as a condition

[1]Originally three employees filed charges. All three were held improperly dismissed by the Board, but the Court of Appeals held that the evidence showed that one had refused to cross the picket line out of fear, not principle, and refused to enforce the Board's order as to him.

> of continued employment have been considered and settled with conflicting results in other circuits." *NLRB* v. *Southern Greyhound Lines*, supra, at page 1300."

The conflict among the Circuits with respect to the question is also recognized by the Fourth Circuit Court of Appeals in its opinion in the instant case. (Apx. "A.", p. 3a, infra.) The conflicting decisions referred to are printed in the Appendix "B"; page 36a infra.

2. The questions presented, of the right of employees to honor picket lines placed at their employer's place of business by unions that do not represent them, in connection with economic strikes in which their interests are not directly involved; and the right of their employers to require them to work as a condition of continued employment; are of obvious importance in the administration of the National Labor Relations Act.

3. The decision of the Board, granted enforcement by the Court of Appeals, affording the protection of the Act to employees who refuse to cross a picket line maintained by economic strikers in a unit to which they do not belong, and in connection with a dispute in which they are not directly concerned, sanctions and encourages the expansion and extension of strikes and labor controversies far beyond their natural and legitimate bounds, to involve employees who have no direct or immediate connection with the controversy, or interest in its settlement. Such an interpretation and application of the Act, making any employees' dispute every employee's dispute, is contrary to the Act's purpose to avoid labor strife.

4. The decision of the Court of Appeals making a formalistic distinction between the replacement and the discharge of economic strikers whose jobs are absorbed

by the remaining work force, for purposes of reinstatement and back pay, is in conflict with applicable decisions of this Court: to wit; *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, and *NLRB* v. *Rockaway News Supply Co.*, 343 U.S. 71. In *Fleetwood Trailer*, economic strikers applied for reinstatement at the end of the strike, but, because of the diminution of work caused by the strike, no work was available for them. The strikers continued to make known their availability, but the employer hired six new employees when jobs for them became available. This court held that the failure to award these *new* jobs to the strikers was an unfair labor practice, saying, at 389 U.S. 381: "Frequently a strike affects the level of production and the number of jobs. It is entirely normal for striking employees to apply for reinstatement immediately after the end of the strike and before full production is resumed. *If and when a job for which the striker is qualified becomes available,* he is entitled to an offer of reinstatement." [Emphasis added.] In *Rockaway News*, an employee was told to cross a picket line or be fired. He refused, and upon being discharged, filed charges which were upheld by the Board. This Court affirmed an opinion by the Court of Appeals[2] refusing to enforce the Board's order of reinstatement with back wages, saying: *"The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it.* This application of the distinction is not sanctioned by *National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 347, 82 L ed 1381, 1391, 58 S Ct 904. It is not based on any difference in effect upon the employee. And there is no finding that he was not replaced either by

[2]*NLRB* v. *Rockaway News Supply Co.*, 197 F.2d 111 (9th Cir.)

a new employee or *by transfer of duties to some non-objecting employee*, as would appear necessary if the respondent were to maintain the operation . . ." [Emphasis added.]

5. The decision of the Board and of the Court of Appeals, requiring reinstatement of economic strikers whose jobs have been absorbed by employees who did not strike, penalizes your Petitioner for a matter of form rather than substance. Had Petitioner secured peformance of the work abandoned by the employees who refused to cross the picket line, by hiring new employees rather than by assigning it to the remaining employees, who were willing to cross the picket line, the result, following the Board's and Court of Appeal's reasoning, would have been different. However, the effect upon the charging parties would have been no different. Petitioner simply chose to get the work done by means other than replacement of the employees. As stated in Judge Bryan's dissent, quoting from this Court's decision in *NLRB* v. *Rockaway News Supply Co.*, 343 U.S. 71, 75: "Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 21, 1971.

APPENDIX "A"

NLRB v. *Union Carbide Corp.*, (4th Cir.)

OPINION

On Application for Enforcement of an Order of the National Labor Relations Board.

(Argued November 10, 1970. Decided January 5, 1971.)

Before MURRAH*, Senior Circuit Judge, BRYAN and BUTZNER, Circuit Judges.

John D. Burgoyne, Atty., National Labor Relations Board (Arnold Ordman, Gen. Counsel, Dominick L. Manoli, Associate Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, and Donald W. Savelson, Atty., National Labor Relations Board, on brief) for Petitioner.

Jack P. Simpson, New York, New York (David D. Johnson, Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, on brief) for Respondent.

MURRAH, Senior Circuit Judge

This enforcement proceeding involves the relative rights of nonstriking employees who were discharged for refusing to cross a picket line maintained by striking employees of a common employer. The basic facts are not in dispute.

Moss, Mullins and Withrow were employed by Union Carbide in the construction division of the Engineering Department and were working at Union Carbide's South Charleston plant when it was struck by the production and maintenance employees who are represented by the International Association of Machinists. The strike was admittedly an economic strike, and picket lines were

*Of the Tenth Circuit sitting by designation.

posted at the plant. Union Carbide decided that the work of the construction division at the South Charleston plant should continue despite the strike, and to implement this decision distributed to the construction division employees a leaflet known as the "Tailgate Message." The clear import of the leaflet was to warn the nonstriking employees that if they failed to report for work they would not receive any wages and would be subject to disciplinary action as in the case of absenteeism. This occurred the day before the strike began. After commencement of the strike, employees who were absent three days were contacted, requested to return to work and warned of possible disciplinary action if they failed to do so; on the fifth day of absence the employees were informed that if they did not return to work by the ninth day they would be discharged. Moss, Mullins and Withrow did not return by the ninth day and were accordingly discharged.

On recommendation of the Hearing Examiner, the Board found that the threatened disciplinary actions and the actual discharges violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. Section 158-(a)(1), by interfering with the exercise of employee rights guaranteed by Section 7 of the Act, 29 U.S.C. Section 157. It ordered Union Carbide to offer the employees reinstatement, to make them whole for loss of pay from the termination date of the strike until reinstatement and to post appropriate notices.

Union Carbide resists enforcement on two grounds: (1) that Moss, Mullins and Withrow were not engaged in activities protected by Section 7; (2) but even so, that substantial and legitimate business considerations justified the discharges and refusal to rehire the dis-

chargees at the termination of the strike. In support of its first contention, Union Carbide argues that an employee's refusal as a matter of principle to cross a picket line maintained by fellow employees engaged in an economic strike against their common employer is neither concerted action nor protected activity within the meaning of Section 7.

In presently material part, Section 7 guarantees the right of every employee "to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." This circuit has construed this language to mean that for conduct to be protected the purpose of the action must be in furtherance of collective bargaining or other concerted activities for mutual aid or protection. Joanna Cotton Mills Co. v. National Labor Relations Board, 176 F.2d 749 (4th Cir.). And it has been said that nonstriking employees who refuse purely as a matter of principle to cross a picket line have no direct economic stake in the labor dispute and are not engaged in concerted activity for mutual aid or protection. See National Labor Relations Board v. Illinois Bell Telephone Co., 189 F.2d 124 (7th Cir.), cert. denied, 342 U.S. 885. And see also National Labor Relations Board v. L. G. Everist, Inc., 334 F.2d 312 (8th Cir.), where the discharged employees refused to cross a picket line maintained against a third party employer.

But it now seems to be fairly well established by the most recent authority that nonstriking employees who refuse as a matter of principle to cross a picket line maintained by their fellow employees have "plighted [their] troth with the strikers, joined in their common

cause, and [have] thus become . . . striker[s] [themselves]." National Labor Relations Board v. Southern Greyhound Lines, 426 F.2d 1299 (5th Cir.). See also National Labor Relations Board v. Difco Laboratories, Inc., 427 F.2d 170 (6th Cir.). It cannot be denied that respect for the integrity of the picket line may well be the source of strength of the whole collective bargaining process in which every union member has a legitimate and protected economic interest. And any assistance by a union member to a labor organization in the collective bargaining process is for mutual aid or protection of the nonstriking unionist even though he has no immediate stake in the labor dispute.

It cannot be gainsaid that there is record evidence to support the Board's finding that Moss and Withrow refused to cross the picket line as a matter of principle. But we do not think the record affords any factual basis for the finding that Mullins' refusal was based on principle. A careful reading of the testimony reveals that his refusal was based on fear and nothing else.[1]

---

[1]The Trial Examiner recognized that fear was an element in Mullins' decision when he found that "Each decided against walking through the picket line as a matter of principle and, in one case, as a matter of fear." But we find no support for the conclusion that principle was an operative factor in Mullins' refusel. Thus, Mullins testified:

> "A He asked me to come back to work. And I told him no, that I couldn't cross no picket line. And he said, 'Well, there's other men crossing it and they haven't said anything to them.' And I said, 'Well, it is too dangerous to cross a picket line and I can't cross a picket line to go to work. It's too dangerous. I'm afraid to cross the picket line.' (Appendix at page 92.)
>
> * * *
>
> "Q Well, why didn't you cross the picket lines, Mr. Mullins?
> "A Well, I was afraid.
> "Q Any other reason?
> "A Well, that was the main reason. I was afraid. It was too dangerous.
> "Q And why were you afraid?
> "A Well, I was afraid somebody would beat me up or burn my house down or something like that.

(Footnote continued on next page)

One who is afraid to cross a picket line by reason of physical fear makes no common cause, contributes nothing to the mutual aid or protection and does not act on principle. Mullins' refusal to cross the picket line was not protected activity under Section 7, and enforcement of the Board's order as to him will be denied.

Assuming, as we have held, that Moss and Withrow were engaged in Section 7 protected activity, Union Carbide insists that it had substantial and legitimate businesss justification for the discharges which outweighs any interference with Section 7 rights. Thus, it urges that no violation of Section 8(a)(1) occurred. See Robertshaw Controls Company, Acro Division v. National Labor Relations Board, 386 F.2d 377 (4th Cir.). The substantial business justification is said to be the need to discharge those employees who did not return to work by the ninth day in order to prevent such large scale defection in the construction division that continuation of normal construction work would have been impossible.

The Board did not think this position tenable, since replacements were not hired for the discharged employees. The Board took the position that since Moss and Withrow occupied the status of economic strikers they were entitled to the same consideration with re-

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"Q Have you ever crossed a picket line in the past?
"A No, sir.
"Q Have you encountered them before?
"A Sir?
"Q Had you encountered them before last summer?
"TRIAL EXAMINER: Encountered picket lines?
"MR. MURPHY: Yes.
"THE WITNESS: Well, yes. I never did cross one. If that's what you mean. I didn't quite get your question.
"Q (By Mr. Murphy) Yes. That's what I meant. Was your reason always the same as it was last summer?
"A Oh, yes. Yes. Too dangerous to cross a picket line. I've seen people beat up and everything else crossing picket lines." (Appendix at pages 98, 99.)

spect to discharge and replacement, i.e. they may not be discharged but may be replaced by workers hired as permanent replacements during the strike in order to continue operations. We agree. See National Labor Relations Board v. Southern Greyhound Lines, supra; National Labor Relations Board v. John S. Swift Co., 277 F.2d 641 (7th Cir.).

We have been reminded on more than one occasion that "It is the primary responsibility of the Board and not of the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" National Labor Relations Board v. Fleetwood Trailer Co., 389 U.S. 375. We cannot say that the Board has violated that responsibility by equating an employee who honors a picket line with an economic striker. It follows that Union Carbide's discharge of Moss and Withrow violated Section 8(a)(1).

The remaining defense presented to enforcement is that substantial and legitimate business considerations justified the company's refusal to rehire Moss and Withrow at the termination of the strike. Union Carbide urges that beginning in June, 1967, contractions in the work force resulted in the elimination of the jobs for legitimate economic reasons. This argument ignores the testimony of Union Carbide's own officials that any contractions occurring in the work force during 1967 were due to attrition, i.e. employees who quit, became disabled or retired were not replaced. No affirmative policy of layoffs began until January, 1968. Union Carbide is thus in the untenable position of contending that the illegal discharges in July, 1967, provided an economic justification for refusal to reinstate the employees in

October, 1967. To state such a contention is to answer it. Enforcement of the Board's order is granted as to Moss and Withrow; enforcement is denied as to Mullins for reasons we have stated:

Albert V. Bryan, Circuit Judge, dissenting:

To warrant reinstatement and backpay for the two non-bargaining employees the Board has, for me, "put too fine a point" upon the difference between discharge and replacement. The Board concedes, as it must, that no such sanction could be visited upon the employer had it immediately replaced employees Moss and Withrow when they failed to return to work, instead of discharging them. NLRB v. Fleetwood Trailer Co., Inc., 389 US 375, 379 (1967); NLRB v. Mackay Radio and Telegraph Co., 304 US 333, 345-346 (1938). The mystic line drawn by the Board between the two methods of disengagement is too fine to call for the penalty put upon the Company.

The result of discharge and replacement is for the employee the same. In either separation he does not receive pay subsequently. The Court in NLRB v. Rockaway News Supply Co., Inc., 345 US 71, 75 (1953) protested it could not follow the Board's differentiation:

> "The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it. . . . *It is not based on any difference in effect upon the employee.* . . . Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law." (Accent added.)

Even with the distinction honored, however, the employer is not subject to a mandate of reinstatement and backpay if the refusal to restore the employee is due

to "legitimate and substantial business justifications". NLRB v. Fleetwood Trailer Co., Inc., supra, 389 US 375, 379; Teamsters, Chauffeurs & Helpers Local Union No. 79 v. NLRB, 325 F2d 1011, 1012 (D.C. Cir. 1963), cert. denied 377 US 905 (1964). While the employer is obliged to establish the justifications, the evidence in this case renders the Board's contrary finding without substantial support. See Universal Camera Corp. v. NLRB, 340 US 474 (1951).

To begin with, the charging employees have not to this day—more than three years—been replaced by outsiders. This irrefutably proves their positions were eliminated or undertaken by others within the Company. Cf. NLRB v. Fleetwood Trailer Co., Inc., supra. Again, in NLRB v. Rockaway News Supply Co., Inc., supra, 345 US 71, 75, the Court observed, "[T]here is no finding that he was not replaced either by a new employee or *by transfer of duties* to some non-objecting employee, as would appear necessary if the respondent [employer] were to maintain the operation." Thus the Court recognized the exception from liability if the prior position was absorbed, as here, without the importation of a new employee.

I would not enforce the order for backpay and reinstatement.

UPON REHEARING

Upon consideration of the petition of the National Labor Relations Board for rehearing and of the suggestion for a rehearing en banc;

Now, therefore, with the concurrence and approval of the other members of the panel, and in the absence of a request for a poll of the entire court as provided by Appellate Rule 35(b);

It is ADJUDGED and ORDERED that the National Labor Relations Board's petition for a rehearing is denied.

Upon consideration of Union Carbide Corporation's petition for a rehearing addressed to the panel;

With the concurrence of Judge Murrah and Judge Butzner, it is ADJUDGED and ORDERED that Union Carbide Corporation's petition for a rehearing is denied. Judge Bryan dissents and files the attached statement of his views.

It is further ADJUDGED and ORDERED that the first paragraph on page 6 of the slip opinion is amended to read as follows:

> "One who refuses to cross a picket line by reason of physical fear does not act on principle. He makes no common cause, and contributes nothing to mutual aid or protection in the collective bargaining process. We hold, therefore, that Mullins' refusal to cross the picket line was not protected activity under Section 7, and enforcement of the Board's order as to him will be denied." *s/ John D. Butzner, Jr.*

Albert V. Bryan, Circuit Judge, dissenting:

I see no ground for a reconsideration of Mullins' discharge. It was found not to be an unfair labor practice, and properly so, I think.

To the refusal of the Court to grant the respondent a rehearing as to Moss and Withrow, I renew the dissent I noted to the first opinion in this case. I now again express disapproval of the reinstatement and backpay allowed these two employees.

JUDGMENT

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for enforce-

ment of an order issued by it against Respondent, Union Carbide Corporation, its officers, agents, successors, and assigns on the 4th day of March, 1969, in proceedings before the said Board known upon its records as Case Nos. 9-CA-4558; 9-CA-4564-1 and 9-CA-4564-2; upon the answer of said Respondent, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said order of the National Labor Relations Board be, and it is hereby, enforced as to Moss and Withrow, and that enforcement as to Mullins is denied and that the said Respondent, Union Carbide Corporation, its officers, agents, successors and assigns abide by an perform the direction of the Board in said order as so enforced contained, in accordance with the opinion of the Court filed herein.

/s/ Samuel W. Phillips
CLERK

Filed March 2, 1971
Samuel W. Phillips
Clerk

In the matter of Union Carbide Corporation, 174 *NLRB* No. 147:

TRIAL EXAMINER'S DECISION

Statement of the Case

THOMAS S. WILSON, Trial Examiner: Upon charges duly filed by Charging Parties Withrow, Moss, and Mullins, filed respectively on December 20, 26, and 29, 1967, the General Counsel of the National Labor Relations Board, hereinafter referred to as the General Counsel[1]

[1]This term specifically includes the attorney appearing for the General Counsel at the hearing.

and the Board, respectively, by the Regional Director for Region 9, Cincinnati, Ohio, [2] issued its complaint dated March 20, 1968, against Union Carbide Corporation, hereinafter referred to as the Respondent. The complaint alleged that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Labor Management Relations Act, as amended, herein referred to as the Act.

Respondent duly filed an answer admitting certain allegations of the complaint, but denying the commission of any unfair labor practices.

Pursuant to notice a hearing thereon was held before me in Charleston, West Virginia, on June 27, 1968. All parties appeared at the hearing, were represented by counsel, and were afforded full opportunity to be heard, to produce and cross-examine witnesses, and to introduce evidence material and pertinent to the issue. At the conclusion of the hearing oral argument was waived. Briefs were received from General Counsel and Respondent on August 15, 1968.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. The Business of Respondent

The complaint alleged, the answer admitted, and I therefore find:

Union Carbide Corporation is a New York corporation engaged in the manufacture of chemicals and plastics at its plant in South Charleston, West Virginia. During the past year, which is a representative period, Re-

spondent had a direct outflow of products in interstate commerce valued in excess of $50,000 which it sold and shiped directly from its said plant in South Charleston, West Virginia, to points outside the State of West Virginia.

Accordingly, I find that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Charging Parties

The Charging Parties, Elza Moss, Alan Withrow, and Henry Mullins were until early August 1967 each employed by Respondent in the construction division of its Engineering Department which was headquartered at a Respondent building known as the Technical Center located near Charleston, West Virginia.

Elza Moss was employed as a first class welder with 6 years of earned seniority. Mullins was employed as a journeyman pipefitter with 8 years of earned seniority. Withrow was employed by Respondent in January 1967 as an apprentice pipefitter.

It was stipulated at the hearing that the employees of the Construction Division constituted a separated appropriate bargaining unit which during the time material here was not represented in collective bargaining by any labor organization even though many of the employees therein were members of their own craft unions.

III. The Unfair Labor Practices

A. *The Facts*

[3] Respondent has three main separate installations in and around the Charleston, West Virginia, area which are commonly known as the Institute plant, the South

Charleston plant, and the Technical Center.[2] Each of these locations is physically separated from the other by several miles and each has separate organizations and separate staffs. While the Institute and South Charleston plants arep roduction facilities, the Technical Center engages in no production, but rather is concerned with the design, construction, research, and development of Respondent's other production facilities. The Technical Center is a separate organization and administratively separated from both the South Charleston or Institute plants. All three locations are completely separate as to supervisory functions. The initial administrative tie-in of the three locations is on a corporate level of vice president in New York.

The Institute and South Charleston plants are engaged in the manufacture of chemicals with each having its own complete roster of production and maintenance employees. At the South Charleston plant the employees of the production and maintenance appropriate unit were represented by a local of the International Association of Machinists (IAM).

The Design and Engineering Department engages in no production work. Its primary function is the designing and installation of new capital facilities for chemical production in other plants of Respondent, including Institute and South Charleston. The design section of the department is housed at the Technical Center. The Design and Engineering Department also has a Construction Division consisting of various craftsmen and laborers divided into approximately 20 crafts normally used in construction projects such as, riggers, ironworkers, mill-

[2]The factual findings made here will admittedly be largely plagiarized from Respondent's brief. There will, however, be a few omissions, a few additions, and a few changes, all minor.

wrights, pipefitters, carpenters, electricians, laborers, and cement finishers, which is headquartered at the Technical Center but does the actual construction work in the production plants where either new construction or maintenance work is being done by the department. The Construction Division is used for the purpose of building new or revising existing installations to manufacture chemicals in accordance with designs prepared at the Technical Center. About 85 percent of the work of the Construction Division is that of new construction while the remaining 15 percent is either rearrangement type work or ordinary plant maintenance.[3] At the completion of a new capital installation or of requested maintenance work, the installation is turned back to the operating personnel either [4] at the Institute or South Charleston plant. The Construction Division has fluctuated during the past 5 years from approximately 1,200 to 800 craftsmen and laborers. As noted heretofore, the employees of the Construction Division constituted an appropriate unit separate and distinct from any and all appropriate units comprised of employees at Respondent's production facilities in and around the Charleston area.

As of July 1967 all three Charging Parties had been assigned and were working as part of the Construction Division on Engineering Department work at the South Charleston plant.

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[3]Joseph Fallon, the Associate Director of the Engineering Department during all times material herein testified that on occasions when maintenance departments at nearby production facilities would become overburdened, his department would be asked to perform that maintenance work and thus relieve the plant's own maintenance crew of that maintenance work. This was known as "50 Order Work" whereas new capital project work which would be depreciated over a 13-year period was known by the accounting symbol of "930 Orders."

As of this same time IAM, the recognized bargaining agent for the production and maintenance employees of the South Charleston plant, was engaged in negotiating a new contract with Respondent for the South Charleston production and maintenance unit.

When it became apparent that there was little likelihood of an agreement being reached between IAM and the South Charleston plant management, the Engineering Department determined to carry on the operations it was then engaged in at the South Charleston plant, even if IAM struck that plant. So J. W. Fallon, Associate Director of the Engineering Department, prepared and had read to the construction employees then engaged in work at the South Charleston plant the following:

TAILGATE MESSAGE

July 24, 1967

As you probably know the current collective bargaining agreement between the South Charleston Plant and the International Association of Machinists (IAM) expires at midnight. The union failed to ratify the contract yesterday and a strike has been called for 11:59 tonight.

The Construction Department has a good deal of work to do in the Plant and since we are not party to the contract and are therefore not involved in the dispute, we will continue to perform our regular work even though the Plant is struck. The possibility does exist that the gates will be picketed when you arrive in the morning. Should this occur, each Construction employee is expected to come through the gate and report to his assigned work site. You may use any gate you wish *except* Gates 14 under the Route 60 overpass at the Polyethylene Unit and 9A, the

pedestrian gate, just west of Gate 9, which are to be strictly reserved for contractors[4] and suppliers. You may prefer to drive in and to use Gate 18 which is located near Bldg. 406 at the Gas Separation area off Route 60 at the east end of the overpass since it will be marked as a gate for "Construction Work" and will provide the best access to the parking area at the Lilly Pond.

Any employee who does not report to his assigned job site during normal working hours will not, of course, receive any wages and will be subject to disciplinary action as in the case of absenteeism. Should you not be able to report to work we expect you to call in as is normally done. The following numbers should be used: 747-6008, 6423, 6471, 6680.

[5] On July 25, the production and maintenance employees of the South Charleston plant represented by the IAM went out on a legal economic strike on behalf of their bargaining demands and began picketing the South Charleston plant. This picket line remained until October 8, 1967.

Only July 25, Alan Withrow, Elza Moss, and Henry A. Mullins, the three Charging Parties, appeared individually at the gates to the South Charleston plant ready and willing to go to work. Each found the gate picketed by IAM members. Each decided against walking through the picket line as a matter of principle and, in one case, as a matter of fear. In the case of Withrow, the pipefitter apprentice, there was the added fear that he would lose his status as a pipefitter's apprentice if he crossed the line. Each of the Charging Parties turned back and two,

[4]By this order not to use the Contractors' Gate Respondent recognized the obvious distinction between the employees of Independent Contractors and its own Construction Department employees.

Moss and Mullins, returned to their homes where they called and reported that their absence from work was due to the presence of the picket line at the plant. Withrow went down to the union hall seeking a temporary job which he got the following day. Thereafter Moss and Mullins each reported daily that he was absent due to the picket line in front of the plant or, in Moss' case, on occasions that he was on jury duty.

In addition to having the supervisors read the "Tailgate Message" to all the Construction Department employees prior to the strike, Fallon outlined to the supervisors the following procedures adopted by Respondent designed to keep the construction employees working in the South Charleston plant despite the presence of an IAM picket line:

(1) After a construction employee had been absent from work for 3 days because of the strike, his supervisor was to get in touch with the employee by phone or in person to urge him to return to work and warn him of possible disciplinary action if he failed to do so;

(2) After 5 days of continued absence, the employee was to be sent a letter over Fallon's signature stating in pertinent part:

> This letter is sent to you as a warning in accordance with our disciplinary policy. Continued failure to report for work could result in more severe disciplinary action being taken up to, and possibly including, discharge,[5] or
>
> Please be advised that if you miss four more working days without a valid excuse for your absence, such as jury duty, we will regard you

[5]From the letter Respondent sent Withrow dated July 27.

as terminating your employment with Union Carbide.[6]

(3) On the ninth day of continued absence Respondent notified the employee that "In accordance with Mr. Fallon's letter to you, dated August 4th, you were removed from the payroll as of this date" and arrangements were set forth for settling final financial accounts such as earned vacation pay, savings plan, etc.

[6] This outlined procedure was followed to the letter as to each of the three Charging Parties here.

As Respondent pointed out, the above procedure or campaign reduced the number of absent employees from 109 the first day of the strike to 11 on the ninth and fatal day when the 11,[7] including the Charging Parties, were notified of their "removal from the payroll" and arrangements made for final financial settlements.

Under date of July 27, Respondent over the signature of J. M. Fallon wrote Withrow as follows:

> The current strike at the South Charleston plant does not affect the construction department. There is peaceful picketing at the plant and a vast majority of our construction employees have reported for work. This has been accomplished without any incidents occurring at the plant gates.
>
> We attempted to contact you by telephone on July 27 to discuss your current absence from work. As you are aware, you were absent from work on July 25, 26 and 27 and we consider this as an unexcused absence.
>
> This letter is sent to you as a warning in accordance with our disciplinary policy. Continued

[6] From the letter Respondent sent Moss on August 4. The difference in the date is due to the fact that Moss had been doing jury duty.

[7] Eight of these eleven filed no charges here.

> failure to report for work could result in more severe disciplinary action being taken up to, and possibly including, discharge.
>
> If you have any questions on our position in this matter, please feel free to contact your craft manager.

Moss and Mullins received substantially similar letters. The letter to Moss read in substantial part as follows:

> Last week we explained to you that the current strike at the South Charleston Plant does not affect the Construction Department and that you were expected to continue your normal work schedule.
>
> Today marks the firth day that you have been absent from work excluding the time you have been on jury duty. Please be advised that if you miss four more working days without a valid excuse for your absence, such as jury duty, we will regard you as terminating your employment with Union Carbide.

During this period Mullins and Moss requested reassignment to Construction Division work at some plant not then on strike. The request for transfer was refused One requested to be put on leave of absence. This request was also refused.

After each of the Charging Parties had been absent from work for a period of 9 days each was notified that he was considered to have terminated his employment with Respondent and that his name had been removed from the payrolls. Thereafter a final financial accounting was made by Respondent with each of the Charging Parties.

[7] The South Charleston strike ended on October 8, 1967.

Promptly after the end of the strike Withrow returned to the South Charleston plant seeking his job back. He was told that he was considered as having terminated his employment back in August. When Withrow inquired if he could make application for employment as an apprentice pipefitter, he was told that he would have to make application for the labor gang and work up through the labor gang to an apprentice job. Withrow refused.

None of the three Charging Parties has ever been reinstated.

B. *Conclusions*

These undisputed facts found above lead to the conclusions, here found, that:

1. As soon as Respondent became convinced that IAM, representing the production and maintenance unit employees at the South Charleston plant, was about to engage in a legal economic strike in support of its unsatisfied negotiating demands, Respondent's Design and Engineering Department commenced a campaign designed to force its own construction (nonunit employees to cross the IAM picket line in order to continue their work in the South Charleston plant on pain of disciplinary action "including discharge" for failure to do so.

2. As a result of these tactics, the 109 out of 425 employees who failed to cross the picket line in order to report for work in the South Charleston plant on June 25 had been by the ninth day of the strike reduced in numbzer to 11 who had stuck to their principles not to cross a legitimate picket line.

3. On or about the ninth day of the strike Respondent discharged the three Charging Parties[5] for their failure

[5]Apparently the other eight suffered a similar fate but filed no charges here.

to report for work behind the IAM picket line and because they continued to honor that picket line despite Respondent's orders to the contrary.

These conclusions raise legal questions:

(1) As to the right of a nonunit employee to honor a legitimate picket line placed around the employer's place of business by a union representing other of his employees in another appropriate unit;

(2) As to the right of that employer to discharge the nonunit employee for respecting a legitimate picket line of the union representing his employees in a different and separate appropriate unit.

If, by chance, any doubt as to the answers to the above questions remained after the decisions in *Biles-Coleman Lumber Co. v. N.L.R.B.*, 98 F.2d 18, 23 (C.A. 9, July 11, 1938), enfg. 4 NLRB 679, 706, that doubt was removed when the Board adopted the well-reasoned and documented Trial Examiner's Decision by Trial Examiner Fannie Boyls in *Southern Greyhound Lines*, 169 NLRB No. 148, stating in pertinent part:

> [8] It is found that Respondent did unlawfully terminate Anderson's employment when it discharged her for refusing to cross the picket line and come to work. In refusing to cross the picket line at her place of employment and come to work, Anderson was assisting the labor organization then on strike. It did not matter that she was not a member of the bargaining unit represented by that union or of any other bargaining unit. It is well settled that Section 7 of the Act protects an employee in his right to assist a labor organization regardless of whether he is eligible for membership in it and that his employer violates Section 8(a)(1) of the Act by discharging him for engaging in this protected activity.

This Board Decision decided all points raised by Respondent in the instant case adversely to Respondent's contention except for one not there involved.

Respondent raises one point here not decided in the *Southern Greyhound case*. It appears in Respondent's brief as follows:

> It is Respondent's position that, even assuming Moss, Mullins and Withrow were engaged in protected activity [as already found here] and thus afforded the normal of rights of economic strikers, they need not be reinstated at the conclusion of the strike inasmuch as their jobs had been eliminated because of a contraction of the total work force.
>
> Fallon testified that at the time the strike occurred on July 25, 1967, there was a downward trend in the employment of the construction force. This was recognized six to nine months in advance of this time based on the fact that there was no new or sizeable projects in the engineering stage that would require as many employees on the construction force as there were in June of 1967.
>
> * * * * * * * [9]
>
> The decrease in the work force from June 18, 1967 to January of 1968 was accomplished by normal attrition. This includes separation from the payroll due to retirement, disability, voluntary quits, etc. No personnel were hired to replace the decrease of normal attrition. Lake stated that experience has shown that normal attrition amounts to 8 employees a month. This of course, is an average.

[9] In the omitted part of the brief Respondent traces the decline of the number of employees on this construction force from 1,086 on June 18, 1967, to 1,064 as of July 30, 1967, to 1,011 as of January 7, 1968.

> Normal attrition was utilized to trim the size of the payroll in relation to the diminishing work of the construction forces. Normal attrition was sufficient to maintain an adequate work force until January of 1968. At that time it was necessary for Respondent to affirmatively lay off employees. From January on, both attrition and layoff have been used to reduce the work force. At the present time there are still employees on layoff that had been affected since January 1968.
>
> * * * * * * * *
>
> [9] From all of the foregoing, it is clearly evident and not contradicted by General Counsel, that Respondent's work force has contracted since prior to the strike and is less today than at the time of the strike for substantial and legitimate business reasons.
>
> It is self evident that the Charging Parties, Moss, Mullins and Withrow, can claim no greater rights than those of a normal economic striker. Economic strikers have rights to reinstatement at the conclusion of a strike only if they have not been replaced or their jobs eliminated or absorbed by other employees. *N.L.R.B.* v. *Mackay Radio and Telegraph Co.*, 304 US 330 and *Universal Camera Corp.* v. *N.L.R.B.*, 340 US 474.

Contrary to the claim made in its brief that the "decrease in the work force from June 18, 1967, until January of 1968 was accomplished by normal attrition," the fact is that Respondent unilaterally and illegally eliminated the jobs held by the three Charging Parties here by discharging and removing the Charging Parties from the payroll. There was no "normal attrition" involved in any of these cases. The three Charging Parties were

discharged and thereafter Respondent chose not to refill the positions.

Respondent could eliminate jobs legally when it was done by attrition; i.e., through the voluntary act of the employee in ceasing his employment.

But Respondent could not eliminate the jobs of the three Charging Parties here by discharge without violating Section 2(3) of the Act.

Section 2(3) of the Act defines an employee as including "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment . . ." The work Moss, Mullins, and Withrow had been performing as employees of the Respondent ceased on July 25, 1967, as a consequence of or in connection with the current labor dispute between IAM and Respondent and none of the Charging Parties had obtained regular and substantially equivalent work elsewhere. Hence all three remained employees of Respondent during the period of the current labor dispute. It is to be noted that the currency of the labor dispute is the only time limitation mentioned in the Act.

By oral and written word Respondent here illegally conditioned the retention of their employment of the Charging Parties upon their returning to work through the IAM picket line within a period of 9 days. This condition required the Charging Parties to abandon their rights to engage in concerted activities with and to assist in the IAM's strike as guaranteed to them by Section 7(a) of the Act. In addition the labor dispute between IAM and Respondent remained current long after the expiration of the 9-day period granted the Charging

Parties by the Respondent in its correspondence to them. As there is no such time limitation as to the currency of the labor dispute in the Act, this time condition imposed by Respondent as also illegal. In addition to the illegal time limitation the further condition imposed by Respondent that the Charging Parties return to work through the IAM picket line required the Charging Parties to abandon their rights to engage in protected concerted activities with and on behalf of the IAM and its striking members. These conditions imposed by Respondent on the Charging Parties' rights to retain employment with Respondent effectively and illegally nullified the rights guaranteed them by Section 7 of the Act.

[10] In fact the whole campaign devised by Respondent from the "Tailgate Message" of July 24 through the 3- and 5-day notices to return to work through the picket line upon pain of "disciplinary action, including discharge" tended and was intended to interfere with, restrain, and coerce Respondent's employees, including the Charging Parties, into abandoning their rights guaranteed them by Section 7 of the Act to engage in protected concerted activities, all in violation of Section 8(a)(1) of the Act.

As Moss, Mullins, and Withrow were illegally discharged early in the month of August 1967, it is immaterial that Mullins and Moss did not thereafter seek reinstatement as that would have been a futile gesture as proven by the request after October 8, 1967, by Withrow for such reinstatement. As illegally discharged employees it is incumbent upon Respondent to seek out the employee and offer him reinstatement.[10]

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[10]See *N.L.R.B.* v. *Cowell Portland Cement Company*, 148 F.2d 237, 245 (C.A. 9), cert. denied 326 U.S. 735.

Respondent's campaign of intimidation of those who refused to cross the picket line proved successful in that it reduced the number of employees continuing to exercise their Section 7 rights by refusing to cross a legitimate picket line from 109 on the first day of the strike to 11 on the ninth day thereof when those 11 were "dropped from the payroll" because Respondent "considered that they had voluntarily terminated their employment" by failing to report for work on the ninth day. In less euphemistic language Respondent fired the 11 illegally, as found above.

The distinction here between "normal attrition" and discharge becomes of importance as regards Respondent's argument to the effect that the "contraction" of jobs prevents the reinstatement of the three Charging Parties. As Respondent pointed out, this contraction was accomplished exclusively through "normal attrition"; i.e., not filling jobs voluntarily relinquished by the jobholder. This was so in all cases until January 1968, except as regards the three Charging Parties—forgetting the remaining eight who filed no charges here. The facts show that there were jobs for these three right up to the instant of their discharge. In fact Respondent was making a terrific effort to retain the services of these three—if they would cross the picket line—right through the ninth day of grace given them by Respondent. As Respondent would not have made such intensive efforts if there had been no work, it is obvious that there were jobs for the three at least until the ninth day of grace provided by Respondent had passed and Respondent had become convinced that these three intended to exercise their guaranteed rights to engage in concerted activities despite Respondent's efforts. Hense there were jobs for the three, even though under the

rules promulgated by Respondent the three had to abandon the rights given them in Section 7 in order to keep the jobs. Therefore the three are entitled to reinstatement.

Apparently forgetting these three aforementioned illegal discharges, Respondent contends that the first layoff necessitated by lack of jobs occurred in January 1968, another indication that there were jobs available for the three if they had been willing to cross the picket lines. In cases of layoff it was Respondent's rule to select the individuals to be laid off according to strict rules of seniority. It is very possible that under [11] such rules of seniority neither Moss nor Mullins with their 6 and 8 years of seniority would have been eliminated even in Respondent's January layoffs. Withrow's rights during the January 1968 layoff can be determined in a compliance proceeding.

Consequently I must find that the three Charging Parties were and are entitled to reinstatement.

IV. The Effects of the Unfair Labor Practice Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I will recommend that Respondent

cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminated in regard to the hire and tenure of employment of Alan E. Withrow, Elza Moss, and Henry A. Mullins by discharging each of them in the first week of August 1967, because of his protected concerted activities on behalf of the IAM, I will recommend that Respondent offer to each of them immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges and make each of them whole for any loss of pay he may have suffered by reason of said discrimination against him by payment to him of a sum of money equal to that which he would have earned from the date of the discrimination against him to the date of his reinstatement, less his net earnings during such period, in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon at 6 percent per annum.

Because of the variety of the unfair labor practices engaged in by Respondent going to the heart of the Act, I sense an opposition by Respondent to the policies of the Act in general, in answer I deem it necessary to order Respondent to cease and desist from in any manner infringing upon the rights guaranteed its employees in Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record, I make the following:

Conclusions of Law

1. By discharging and thereafter refusing to reinstate Alan E. Withrow, Elza Moss, and Henry A. Mullins

because each of them engaged in the protected activity of assisting a labor organization, Respondent has interfered with, restrained, and coerced each of them in the exercise of his rights guaranteed by Section 7 of the Act and has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

[12] 2. By discriminating in regard to the hire and genure of employment of Alan E. Withrow, Elza Moss, and Henry A. Mullins in order to discourage protected concerted activity and assistance to a labor organization Respondent has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in the instant case, it is hereby ordered that Respondent, Union Carbide Corporation, Charleston, West Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging any employee because he has engaged in concerted activities and assisted a labor organization by refusing to cross a lawful picket line at his place of work.

(b) Threatening its employees with disciplinary action, including possible discharge, for refusing to cross a picket line of any labor organization of its own employees.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to each, Alan E. Withrow, Elza Moss, and Henry A. Mullins, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered by him by reason of the unlawful discharge in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll and other records helpful to analyze and determine the amount of backpay due under the terms of this Recommended Order.

(c) Post at its Technical Center, Institute, and South Charleston plants copies of the attached notice marked "Appendix."[11] Copies of said notice [13] on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[12]

It is further recommended that, unless Respondent notifies said Regional Director within 20 days from the receipt hereof that it will take the action here recommended, the Board issue an order directing the Respondent to take the action here recommended.

Dated at Washington, D.C. October 22, 1968

TXD—597—63

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> WE WILL NOT discharge or refuse to reinstate any employee for refusing to cross a picket line to come to work during a lawful strike at any of our plants.
>
> WE WILL NOT threaten any of our employees with discharge or refuse to reinstate for failing to

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[11]In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[12]In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 9, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

cross a legal picket line to go to work at any of our plants.

WE WILL offer to each, Alan E. Withrow, Elza Moss, and Henry A. Mullins, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed by him, and make him whole for any loss of pay which he may have suffered by reason of his discharge with interest thereon at 6 percent per annum.

WE WILL NOT in any manner interfere with, restrain, or coerce any employee in the exercise of his rights guaranteed under the Act to assist a labor organization or to engage in concerted protected activities.

UNION CARBIDE CORPORATION

(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 684-3686.

D-1694
Charleston, W. Va.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNION CARBIDE CORPORATION
and Case 9-CA-4558
ALAN E. WITHROW
and Case 9-CA-4564-1
ELZA MOSS
and Case 9-CA-4564-2
HENRY A. MULLINS

March 4, 1969

DECISION AND ORDER

On October 22, 1968, Trial Examiner Thomas S. Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has review the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Respondent's exceptions and brief, and the entire record in these cases, and hereby adopts the findings, conclu-

sions, and recommendations of the Trial Examiner, as herein modified.[1]

The Remedy

Insofar as it provides that Alan Withrow, Elza Moss, and Henry Mullins are to receive backpay from the date of their discharges, the Board does not adopt the Trial Examiner's Recommended Order. It is the Board's practice not to award backpay to employees discriminatorily discharged while on strike because, until it appears that the employees have given up the strike, it cannot be established that the loss of wages was attributable to the employer's conduct. See *Kohler Co.*, 128 NLRB 1062, 1110. Since it is reasonable to infer from the record that the three sympathy strikers would have returned to work on October 9, 1967, the day after the picket line was removed, the Respondent will be required to make them whole for their loss of earnings by payment to each of them of the sum which they would normally have earned on and after October 9, 1967, to the date the Respondent offers them reinstatement, less their net earnings for that period.[2] See *Difco Laboratories, Inc.*, 172 NLRB No. 235; *Southern Greyhound Lines*, 169 NLRB No. 148.

ORDER

Pursuant to Section 10(c) of the National Labor Re-

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[1]We affirm the Trial Examiner's finding that the discharges violated Section 8(a)(1). Because the remedy would be the same whether the discharges were found violative of Section 8(a)(1) or (3) of the Act, we need not decide whether the discharges were also violative of Section 8(a)(3). Accordingly, we do not adopt the Trial Examiner's finding of a violation of that section.

[2]Like the Trial Examiner, we reject the Respondent's contention that the three discharged strikers may not have been employed in any event at the conclusion of the strike, since it is uncontested that all personnel reductions in the Respondent's operations prior to January 1968 were achieved through attrition. Whether or not the three employees would have been working beyond that date is a matter which may properly be litigated in the compliance stage of the proceedings.

lations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that the Respondent, Union Carbide Corporation, Charleston, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Add the following as paragraph 2(b), and reletter the following paragraphs accordingly:

(b) Notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

2. Add the following as the fourth indented paragraph of the Appendix:

> WE WILL notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

Dated, Washington, D.C.
March 4, 1969

John H. Fanning, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX "B"

NLRB v. *Illinois Bell Telephone Co.*, 189 F.2d 124 (7th Circuit); cert. den. 342 U.S. 885:

Before MAJOR, Chief Judge, and KERNER and SWAIM, Circuit Judges.

MAJOR, Chief Judge.

This is a petition by National Labor Relations Board (hereinafter called the Board) for enforcement of its order issued against respondent, Illinois Bell Telephone Company, on March 16, 1950, following the usual proceedings in such cases. Respondent denies the validity of the order and requests that enforcement be denied.

The case has to do with the demotion by respondent of eight supervisory employees[1] because of certain activities under circumstances hereinafter set forth. The Board concluded that such employees were engaged in a concerted activity protected by §7 of the Act, 29 U.S.C.A. § 157, and that respondent's action violated § 8(1) of the Act, 29 U.S.C.A. § 158(1), and "because such a demotion amounts to a discrimination in hire and tenure of employment and thereby discourages membership in a labor organization it also violates Section 8(a) (3) of the Act."

The issues for decision are in the main legal in their nature because there is little, if any, dispute in the evidentiary facts. To bring such issues into focus, however, it appears necessary to make a rather detailed state-

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[1]The employees demoted were Frances Regan, Lillian Jensen, Edith Holmes, Irene Keuther, Helen Marcellaio, Rose Winder, Catherine Brophy and Dorothy Jungbluth. Whether they were supervisory employees within the contemplation of the Act is open to question. The Board takes the position, under the circumstances of the case, that it is immaterial, and we shall do likewise.

ment of the facts. Respondent, an Illinois corporation with its principal office in Chicago, Illinois, is engaged in the communications industry, rendering telephone service both within and without the State of Illinois. The unions involved in the proceeding, directly or indirectly, are Illinois Telephone Traffic Union (called I.T.T.U.) and Chicago Telephone Traffic Union (called C.T.T.U.). The membership in the former in the main consisted of those employed in the State outside of the boundaries of Chicago; the latter represented those employed within the City of Chicago. The former, as the duly designated bargaining agent for the employees in the State area, had a contract with respondent which expired on or about March 1, 1947. On April 7, 1947, that union commenced an economic strike against respondent to obtain changes in working conditions, as well as a wage increase. Picket lines were set up at respondent's installations throughout the State area, and also at all exchanges within the Chicago area, on the morning of April 7. The strike lasted through May 8, 1947, and picket lines were maintained at all central office exchanges within the Chicago area until that time.

The C.T.T.U. was the duly designated bargaining agent for respondent's employees in the Chicago area, including those involved in this proceeding. This union also had a contract with respondent, entered into on July 25, 1946, which expired March 29, 1947. On March 25, 1947, C.T.T.U. and respondent signed an "Extension Agreement" extending the old agreement until April 28, 1947. Another "Extension Agreement" was entered into on April 25, 1947, extending the old agreement to June 2, 1947, and a new contract was signed on May 15, 1947. As the Trial Examiner stated, "C.T.T.U. did not engage officially or unofficially in the strike commenced by

I.T.T.U. on April 7, 1947 but, as appears above, it met with Respondent during the strike period and ultimately signed a new contract on May 15." The record does not disclose the number of respondent's employees who were members of these respective unions; however, the contract entered into between respondent and C.T.T.U. in July, 1946, recites that no less than 6,000 employees were members of that union in good standing. It appears that some of the involved employees held membership in both unions at the time of the strike. Seven were members of the striking union, three were members of C.T.T.U., and one was not a member of either; however, as stated, all eight employees were in the bargaining unit represented by C.T.T.U.

As noted, I.T.T.U. commenced an economic strike against respondent on April 7, 1947, and established picket lines not only at respondent's installations throughout the State area but also at respondent's installations throughout the Chicago area represented by C.T.T.U., and also as noted, C.T.T.U. did not participate in any way in the strike. At that time, it was engaged in bargaining with respondent for a new contract. On April 8, the eight employees involved, without any previous notice or warning to respondent, failed to report for work because of their refusal to cross the picket line of the striking union. Subsequently, respondent, upon inquiry, was told by the employees that this was the reason for their refusal to work. As witnesses before the Trial Examiner, they testified to the same effect. Typical of such testimony is that of Miss Jungbluth, "I didn't want to come in because there was a picket line and I didn't believe in crossing the picket line"; Miss Marcellaio, "I saw the picket line and I went home"; Miss Keuther, "As a union member and also as an American citizen, I

said, I feel it is my duty to respect a picket line." Miss Holmes did not approach the picket line but by telephone from her home learned that there were pickets in front of the office and refused to come to work "until after the pickets have been removed."

On April 11 and 12, 1947, respondent directed a letter to each of the involved employees in which they were told that their jobs would be placed in jeopardy by a continued absence from work, that they were being demoted from their authority as supervisor to that of operator, and that their employment would be suspended as of the first day they failed to report for the new assignment. Respondent during the time of the absence of these employees arranged to have their work performed by utilizing its replacement supervisors, by recalling regular supervisors who were off duty, and in general by reallocating the work of its force of telephone supervisors. At the termination of the I.T.T.U. strike on May 8, 1947, the pickets were removed. The following day, or shortly thereafter, the demoted employees reported for work and each was assigned to the position and duties of a telephone operator. The salary paid an operator was lower than that received by a supervisor.

It was the demotion of these eight employees by respondent which the Board found to be a violation of §§ 8(1) and 8(3) of the Act. On this premise the Board's order requires respondent to cease and desist from discouraging membership in Illinois Traffic Division 14, C.W.A. (successor of I.T.T.U.) or any other labor organization of its employees, by discriminating in their employment and in any like or related manner from coercing its employees of the right guaranteed by § 7 of the Act. And respondent was required to offer the eight em-

ployees reinstatement to their former positions as telephone supervisors, to make them whole for any loss in wages, pension rights or sick benefits which they suffered as a result of their demotions, and to post appropriate notices.

[1] The crucial issue, as we view the situation, is whether the eight employees were protected by § 7 of the Act. If so, the finding of an unfair labor practice and the order resulting therefrom is sustainable; otherwise, not. That section provides, 29 U.S.C.A. § 157: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection".

It is the Board's theory that the eight employees were engaged in "concerted activities" for their "mutual aid or protection." The Board terms the activities of the eight employees a "strike," while respondent labels it as a "wildcat strike." In our view, it was not a strike in any ordinary connotation of that term. This court, in C. G. Conn. v. N.L.R.B., 7 Cir., 108 F.2d 390, 397, accepted the definition of a strike as contained in American and English Encyclopedia of Law, Volume 24, page 123, as follows: "The term 'strike' is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a prearranged time, and refusing to resume work until the demanded concession shall have been granted."

While the Labor Management Relations Act of 1947 is inapplicable because the events in controversy took

place prior to its enactment, it is interesting to note that § 142 provides: "The term 'strike' includes any strike or other concerted stoppage of work by employees * * * and any concerted slow-down or other concerted interruption of operations by employees."

There is no evidence that these eight employees acted in combination or concert. They did not converse with each other or any other person regarding the activity in which they engaged, that is, a refusal to cross the picket line. The record disclosed unmistakably that each acted in her own individual capacity. The Board in its brief states, "Their only concern was to help the I.T.T.U." Even that concession is the result only of a dubious inference. None of the involved employees testified to any such concern. Their testimony discloses that their refusal to cross the picket line was a matter of principle, and that it would have made no difference whether the picket line was maintained by I.T.T.U. or some other union. The Board in its brief states that these employees "had no grievance which could have been adjusted through grievance procedures. The object behind their refusal to cross the picket line was merely to support the grievance of others." And at another point the Board states, "Here, there was no controversy between respondent and the C.T.T.U.; the complaintants merely refused to cross the I.T.T.U. picket lines to support the demands of the I.T.T.U. rather than their own grievances."

Assuming, however, contrary to what we think, that the involved employees engaged in "concerted activities," we are unable to discern from this record, and particularly in view of the concessions made by the Board, how it can be held that such activities were for their "mutual aid or protection." They neither sought

nor were entitled to seek on their own behalf any aid or protection from respondent. That was the sole function of C.T.T.U., the duly selected and existing bargaining representative for the unit of which the involved employees were a part. The Board in its brief concedes, "These agreements [those between respondent and C.T.T.U.] bound the employees to work in conformity with the wages, hours, and working conditions provided in them. Employees dissatisfied, for example, with their wages were not entitled to seek to revise them by strike action before the expiration of their agreements." In other words, these employees were without right to bargain with respondent or to strike because of any grievance which they had or for their own aid or protection, but they had such right, according to the Board, in behalf of employees of a different unit and represented by a different bargaining agent.

So far as we are aware, no court has passed upon the precise question here involved; however, there are numerous cases where it has been held under a variety of circumstances that concerted activities by a group of employees were not protected by § 7 of the Act. Southern Steamship Co. v. N.L.R.B., 316 U.S. 31, 46, 62 S.Ct. 886, 86 L.Ed. 1246; N.L.R.B. v. Sands Mfg. Co., 306 U.S. 332, 344, 59 S.Ct. 508, 83 L.Ed. 682; N.L.R.B. v. Reynolds International Pen Co., 7 Cir., 162 F.2d 680, 683; N.L.R.B. v. Draper Corp., 4 Cir., 145 F.2d 199, 202; Joanna Cotton Mills Co. v. N.L.R.B., 4 Cir., 176 F.2d 749 752.

No good purpose could be served in a detailed analysis of these and other cases which could be cited. The case most nearly in point is that of N.L.R.B. v. Draper Corp., 4 Cir., 145 F.2d 199. There, as here, the company

was bargaining with a union as a representative of its employees. While so engaged, a number of the employees ceased work in what is referred to as a "wildcat strike." The discharge of such employees was found by the Board to be an unfair labor practice, but the court denied enforcement of its order. The Board before that court argued, as it does here, that the employees who went on strike were engaged in concerted activities for their "mutual aid or protection." The court in denying such contention stated, 145 F.2d at page 202: "* * * we are of opinion that the 'wild cat' strike in which the employees were engaged and for which they were discharged was not such a concerted activity as falls within the protection of section 7 of the National Labor Relations Act, but a strike in violation of the purposes of the act by a minority group of employees in an effort to interfere with the collective bargaining by the duly authorized bargaining agent selected by all the employees. The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace."

And on the following page: "Even though the majority of the employees in an industry may have selected their bargaining agent and the agent may have been recognized by the employer, there can be no effective bargaining if small groups of employees are at liberty to ignore the bargaining agency thus set up, take particular matters into their own hands and deal independently with the employer. The whole purpose of the act is to give to the employees as a whole, through action of a majority, the right to bargain with the employer with respect to such matters as wages, hours and conditions of work."

In distinguishing the Draper case, the Board states, "In this case, the concerted activity engaged in bore no relationship to the then current bargaining negotiations between the C.T.T.U. and respondent." We think that it is a questionable statement. It may be that the activities had no appreciable effect upon bargaining negotiations then in progress but, if so, it was only because of the small number of employees who were participants (1%, so it is stated in respondent's brief). But suppose it had been 10%, or 50%, of those in the bargaining unit represented by C.T.T.U. Under such circumstances, could it be held that the cessation of work by such a large proportion of members of the unit would not seriously interfere with the prerogatives which the Act confers upon the agent selected to represent it? Not only would the authority of the bargaining agent be impaired under such circumstances, but any contract entered into would be of little value. Such activities by a large group would clearly be in derogation of the authority of the bargaining agent and would not be protected by § 7. And we discern no reason why a small group of employees (eight, in the instant case) would be entitled to the protection of the Act for activities which, if indulged in by a larger group, would be unprotected.

In J. I. Case Co. v. N.L.R.B., 321 U.S. 332, 339, 64 S.Ct. 576, 581, 88 L.Ed. 762, the court made the following pertinent observation: "The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result."

The Trial Examiner in his findings, referring to the refusal of the involved employees to cross the picket

line, stated, "By so doing these eight employees placed themselves in the position of sympathy strikers who made common cause with those engaged in the economic strike against their common employer. As a result, their legal status became identically that of the striking employees of the I.T.T.U. State unit, namely economic strikers." We think it is a novel theory that the mere refusal to cross a picket line, in the absence of any other activity, makes the one who refuses a party to the strike, but even so, as already shown, such refusal was not for the "mutual aid or protection" of the employees involved. It could have only been for the benefit and aid of those in a different bargaining unit, the representative of which could not have represented the involved employees and, consequently, could have obtained nothing from respondent for their benefit.

The unreasonableness of the Board's decision is emphasized by its order wherein respondent is directed to cease and desist from "interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Illinois Traffic Division 14, Communications Workers of America, successor of Illinois Telephone Traffic Union, N.F.T.W., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities * * *."

[2] Other than incidents which we have discussed, there is not a scintilla of proof that respondent interfered in any form or manner with the right of its employees to join a labor organization of their own choice, or that it refused to bargain collectively with the agents

selected by such employees. In fact, the record indisputably demonstrates that respondent bargained with C.T.T.U. in good faith, with a resultant contract, and it also bargained with the striking union, with a like result. There is no evidence of any hostility or favoritism on behalf of respondent against or for any union. Aside from what we have heretofore said, the Board is not entitled to enforcement of the board, sweeping terms of the order presented. Cf. Interlake Iron Corp. v. N.L.R.B., 7 Cir., 131 F.2d 129, 134; Western Cartridge Co. v. N.L.R.B., 7 Cir., 139 F.2d 855, 858.

The petition for enforcement of the Board's order is denied.

NLRB v. *Everist, Inc.*, 334 F.2d (8th Cir.3

Before VOGEL, MATTHES and BLACKMUN, Circuit Judges.

VOGEL, Circuit Judge.

The National Labor Relations Board, pursuant to § 10(e) of the National Labor Relations Act as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C.A. § 151 et seq., has petitioned this court for enforcement of its order of April 23, 1963, corrected on June 7, 1963, following the usual proceedings under § 10 of the Act. The Board's decision and order are reported in 142 N.L.R.B. No. 20. This court has jurisdiction under § 10(e) of the Act. The Board found that respondent had violated § 8(a) (1) of the Act by refusing to reinstate four drivers upon their unconditional application for employment which followed their discharge after they had refused to cross a picket line of another and different union picketing an employer with whom the drivers had no connection. The Board also found that at times other than referred

to herein respondent had further violated § 8(a) (1) by creating an impression of surveillance and by threatening employees with loss of their jobs if they supported the union. The second violation of § 8(a) (1) is not in actual dispute here. This controversy surrounds solely the refusal of the employer to reinstate the four drivers. There is little or no dispute in the actual physical facts which we summarize as follows:

L. G. Everist, Inc., the respondent, is engaged in the production, sale and hauling of aggregate and related products. Its drivers were represented at all times material herein by the General Drivers and Workers Union Local 749, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Such union was certified by the Board as the exclusive bargaining representative. In late 1961 respondent contracted with a transportation company to haul aggregate to Jones, Brown and Root Construction Company, prime contractor at a dam construction site near Chamberlain, South Dakota. The construction project was a large one engaging some 550 workers in all.

On Friday, December 8, 1961, the dam construction site was being picketed by the Iron Workers Union which had a dispute with Western Contracting Corporation, one of the other contractors on the job. It was apparent from the sign carried by the picket that only Western and not Jones, Brown and Root, the prime contractor, was being picketed. The sign read:

> "IRON WORKERS NO. 184 ON STRIKE FOR A CONTRACT WESTERN CONTR. CORP. THIS DISPUTE WITH ABOVE CONTRACTOR ONLY"

Respondent's nine truck drivers arrived with their trucks to deliver aggregate to the prime contractor.

Upon observing the picket, they parked their trucks and called their union representative, who told them not to cross the picket line. At that time none crossed. Shortly thereafter, however, respondent's superintendent, Earl Roe, arrived and after discussing the situation with the prime contractor instructed respondent's nine drivers to either cross the picket line and make their deliveries or to return their loaded trucks to respondent's place of business. Five of the drivers made their deliveries, thus crossing the picket line. The four involved here—Dunlap, Miller, Taylor and Reeves—refused to do so and returned their loaded trucks to respondent's depot as directed. Later that day upon instructions from Roe they reported to the front office, where Roe gave them their final checks and discharged them.

On Monday, December 11, 1961, respondent resumed deliveries to the construction site, using the five drivers who had crossed the picket line together with three of the respondent's supervisors and a student driver. Later that day, however, work on the construction site ceased because of mechanical difficulties of the prime contractor and operations did not again resume until December 15, 1961. In the meantime, the four alleged discriminatees and three of respondent's other drivers met on Monday evening, December 11th, and decided to strike in protest to the December 8th discharge of the four drivers who refused to cross the picket line. The strike and picketing were maintained until the morning of December 14th, at which time the drivers, including the four who had previously been discharged, abandoned the strike and offered to "return to work immediately". During the entire interim of this strike, work at the construction site had ceased because of the mechanical difficulties of the prime contractor so that apparently any significance

which might be attached to the strike was lost or dissipated.

In response to the request to be returned to work, respondent notified the drivers who had crossed the picket line on December 8th and had continued working to report for work the following day. It refused, however, to reinstate the four discharged drivers on the ground that such reemployment after discharge would be a violation of company policy.[1]

Respondent resumed deliveries to the construction site on December 15th, utilizing its five remaining drivers, three supervisors and one other driver. From that time until about Christmas respondent's deliveries were made by the five drivers who were with them originally and who had crossed the picket line, three supervisors and various other employees who were hired during that period. Permanent replacements were hired about Christmas, at which time the three supervisors returned to their normal duties.

The Examiner found that the discharges of December 8, 1961, and respondent's refusal and failure to reinstate Reeves, Taylor, Miller and Dunlap did not violate § 8(a)(3) of the Act since respondent's actions were prompted by its need to continue operations and not in reprisal for the alleged discriminatees having refused to cross the picket line. He recommended that the complaint be dismissed insofar as it alleged violation of § 8(a)(3).

The Board disagreed with the Examiner, and with two members dissenting, found it

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[1]At the hearing it was stipulated that eventually offers of reinstatement were made to Reeves on August 8, 1962, and to Taylor, Miller and Dunlap on August 9, 1962.

> "* * * unnecessary to decide whether, as the General Counsel contends, the Respondent unlawfully discharged the claimants on December 8, since in our view, the Respondent violated Section 8(a) (1) of the Act by refusing to reinstate the claimants upon their unconditional application for reinstatement on December 14, at which time they had not been permanently replaced."

The Board then stated that the Trial Examiner, in agreement with the respondent, had misinterpreted Redwing Carriers, Inc., 137 N.L.R.B. No. 1545, aff'd sub nom. Teamsters, Chauffeurs & Helpers Local U. No. 79, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America v. N. L. R. B., D. C. Cir., 1963, 325 F.2d 1011, as meaning that where an employer lawfully "discharges an employee for refusing to cross a picket line, such "discharge" is tantamount to a discharge for cause and, as in the case of and discharge for cause, the employer is thereafter entitled to refuse to reinstate the employee for the reason that justified the original discharge. Contrarily, the Board, in noting that Redwing held that an employee's refusal to cross a picket line was protected activity, interpreted it as meaning in effect that:

> "* * * a 'discharge' for refusal to cross a picket line is an exception to the general rule that employees may not be discharged for engaging in protected concerted activity. It is therefore not a discharge for cause, but merely a permissible act in furtherance of the employer's overriding right to keep his business going by replacing such employees. To this extent, at least, the employees involved herein are similar to economic strikers, who may also be replaced by an employer to permit continued operation of the business but who, if not permanently replaced, are entitled to re-

instatement upon unconditional application."

The majority of the Board, finding that the four discharged employees had made an unconditional application for reinstatement prior to respondent's hiring of permanent replacements, held that respondent violated § 8(a) (1) of the Act by refusing to reinstate them.

The dissenting members of the Board—Rogers and Leedom—who had also disagreed with the majority of the Board's decision in the original Redwing opinion, stated:

> "Unlike our colleagues of the majority, we would find that the Respondent did not violate the Act by discharging claimants on December 8 and by refusing to reinstate them on December 14. For the reasons stated in the original Board decision in Redwing Carriers, [130 N.L.R.B. 1208; see, also, 137 N.L.R.B. No. 142] we believe that the claimants' refusal to cross the picket line was unprotected activity. We would therefore find that the Respondent acted lawfully in terminating the employment of the claimants because of their refusal to cross the picket line. Since the original discharges were for cause and were therefore lawful, we would further find that the Respondent did not thereafter violate the Act in refusing, for the same reason, to reinstate the claimants."

We are told that this is a case of first impression in an appellate court. The views of three members of the Board who constituted the majority are diametrically opposed to the views of the two dissenting members and the views of the Examiner.

It should probably be emphasized here that the uncontradicted testimony is that the contract between respondent and the prime contractor provided that con-

tinued and uninterrupted deliveries were essential; that the aggregate piles were low; that interrupted deliveries could cause respondent to lose its contract; and that at least some of the drivers were informed when they were hired that deliveries could not be interrupted by strikes. The Board, by its decision, did not disturb the Examiner's findings in this regard or that the discharges "were prompted by Respondent's need to continue operations and were not in reprisal for the claimants having refused to cross the picket line." The Examiner further stated:

> "* * * Having considered the animus and interference, I find that the discharges and the replacement steps were in fact prompted by the need to continue operations, and that the Company did not discriminatorily discharge these employees or unlawfully refuse to reinstate them."

In other words, we do not have involved the same situation with which the Fifth Circuit was concerned in N. L. R. B. v. Cone Brothers Contracting Co., 5 Cir., 1963, 317 F.2d 3 at page 8 certiorari denied 375 U.S. 945, 84 S.Ct. 353, 11 L.Ed. 2d 275, wherein that court stated:

> "* * * when it appears that a discharge of an employee for refusing to cross a picket line is resorted to out of anti-union animus to get rid of a union sympathizer and not to preserve the efficient operation of an employer's business, an unfair labor practice in violation of § 8(a) (1) and (3) occurs. See N. L. R. B. v. Montag Bros., Inc., 140 F.2d 730 (C.A.5, 1944), and perhaps J. A. Bentley Lumber Co. v. N. L. R. B., 180 F.2d 641 (C.A.5, 1950). See also N. L. R. B. v. John S. Swift Company, 277 F.2d 641, 646 (C.A.7, 1960)."

The Board argues here, however, that the respondent violated § 8(a) (1) not in the discharge of the drivers

on December 8th but only in its denial of reinstatement to them on December 14th.

If, in considering this case, we accept, without deciding, the contention of the Board that the refusal of an employee to cross a picket line of a union not his own, against an employer with whom he has no connections whatsoever, is protected activity, in that it is an exercise of "the right to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection" guaranteed by § 7 of the Act, as the Court of Appeals for the Second Circuit did in N. L. R. B. v. Rockway News Supply Co., 2 Cir., 1952, 197 F.2d 111, 113, and as the Supreme Court apparently did in affirming that case in National Labor Relations Board v. Rockaway News Co., 1953, 345 U.S. 71, 73 S.Ct. 519, 97 L.Ed. 832, but that the employer, nevertheless, possessed the right under such circumstances, to continue the orderly and efficient operation of his business by discharging the drivers and replacing them with other employees, then the question in this case must be resolved by the determination of whether the four drivers were *permanently* discharged on December 8th or if by virtue of the fact that they had been engaged in protected activity, their status was more or less one of suspended activity with the right to return to work whenever they so desired so long as the respondent had not permanently replaced them. We have difficulty in following the Board's reasoning that the discharges of December 8th were in reality not discharges at all but constituted "merely a permissible act in furtherance of the employer's overriding right to keep his business going by replacing such employees." The Board would equate such "discharged" employees with economic strikers and hold that they had the right to return to

work at any time up until they had been permanently replaced by the respondent. We find no support for the Board's conclusion. In N. L. R. B. v. Rockaway News Supply Co., supra, the respondent had discharged an employee for refusing, in the performance of his duties, to cross a lawful picket line maintained at premises other than his employer's by a union of which he was not a member. The Board directed reinstatement. The Court of Appeals, by a divided court, denied enforcement of the Board's order. In affirming, with three justices dissenting, the Supreme Court stated at page 75 of 345 U.S., 73 S.Ct. at page 522.

> "* * * The actual controversy here is within a very narrow scope, so narrow that the Board in its opinion said:
>
> > " 'Although Waugh's refusal to cross the picket line was a protected activity, the Respondent, as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties or, as a striker, to vacate his job and make way for his replacement by the Respondent. Instead the Respondent discharged Waugh.'
>
> "The Court of Appeals said * *, 'We cannot follow the Board's reasoning.' Nor can we. *The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it. This application of the distinction is not sanctioned by National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U.S. 333, 347, 58 S.Ct. 904, 82 L.Ed. 1381. It is not based on any difference in effect upon the employee.* And there is no finding that he was not replaced either by a new employee or by transfer of duties

to some nonobjecting employee, as would appear necessary if the respondent were to maintain the operation. Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law.

"In this case there is no finding, evidence or even charge that the dismissal of Waugh resulted from antiunion bias, or was intended to or did discriminate against him to discourage membership in a labor organization." (Emphasis supplied.)

It is true that the Supreme Court affirmed Rockaway News on the ground that the employee there had violated a written collective bargaining contract between his union and his employer which specifically provided against strikes, walkouts and other cessations of work. 345 U.S. 79, 81, 73 S.Ct. 519, 522. However, we see no difference between the refusal to cross a picket line in violation of such a bargaining contract and the refusal to cross a picket line in violation of the ordinary and implied obligations of employment. The one is written, the other implied. In either situation the business operations of the employer are adversely affected and it is on the basis of such detriment sustained by the employer that the Board justifies the respondent's discharges. It must transfer present employees or hire new ones if it is to continue operations.

[1-3] Here, as in Rockaway News, "* * * there is no finding, evidence or even charge that the dismissal of * * * [Dunlap, Miller, Taylor and Reeves] resulted from antiunion bias, or was intended to or did discriminate against * * * [them] to discourage membership in a labor organization." The Examiner found that the four drivers had been "discharged" and such finding was not disturbed by the Board. The discharges were not

premised on any other happenstance or occurrence except refusal to work. They were not conditional in any way. The drivers were discharged and the respondent had a policy of not rehiring any employee who had once been discharged. The respondent had a right to the maintenance of such policy and it proceeded, promptly, to replace the discharged drivers with other of their employees who would perform the work expected of them —delivering aggregate to the prime contractor even if it did mean crossing a picket line of another union against another employer. The refusal of the drivers here to cross the picket line was merely sympathetic activity against a third employer with whom the drivers had no connection and with whose union they were not involved. It did not constitute strike activity against their own employer nor the employer to whom they were making deliveries. It had no effect on their own union, their contract or their relationship with their employer. Such refusal was no more and no less than a refusal to work, a violation of their contract to continue hauling for which they could be and were validly discharged. Such layoff and discharge was a complete severance of the employer-employee relationship and was something which respondent had an absolute right to do so long as its actions were not the result of anti-union bias or intended to discriminate against the employees and to discourage membership in a labor organization. We see no reason in law, in logic or in the provisions of the Act which compels the acceptance of the Board's attempt to equate these drivers with the status of economic strikers and hold that by their refusal to work they might enter into a legal twilight zone from which they could return to work at any time of their own choosing, so long as it was before permanent re-

placements had been hired. As the Supreme Court said in Rockaway News: "The distinction between discharge and replacement in this context seems to us an unrealistic and unfounded in law as the Court of Appeals found it." (345 U.S. 75, 73 S.Ct. 519) The Board's "special function of applying the general provisions of the Act to the complexities of industrial life" embraces no such power and we do not believe it to be "within the mainstream of its duties".[2]

Enforcement of the Board's order is denied insofar as it is based upon respondent's refusal to reinstate the four drivers. Enforcement of the remainder of the order, which is in reality uncontested, will be granted.

MATTHES, Circuit Judge (dissenting).

The pivotal issue presented by this proceeding, and so recognized by the parties, is whether the refusal of the four employees to cross the picket line constituted protected activity. The majority fails to come to grips with this question but attempts to demonstrate principally on the authority of Labor Board v. Rockaway News Co., 345 U.S. 71, 73 S.Ct. 519, that even if it be conceded that the employees engaged in protected activity, nevertheless they were *permanently* discharged on December 8, such discharge was a complete severance of the employer-employee relationship, and respondent's failure to reinstate the employees could provide no basis for an 8(a) (1) violation.

First, it should be noted that in Rockaway the Supreme Court expressly declined to promulgate any sweeping abstract principles as to the respective rights of employer and employee regarding picket lines. Secondly,

[2]National Labor Relations Board v. Erie Resistor Corp., 1963, 373 U.S. 221, 236, 83 S.Ct. 1139, 10 L.Ed.2d 308.

while the Supreme Court did not expressly hold that the involved employee had engaged in unprotected activity, it seems to me that this deduction is inescapable because of the Court's holding that the questioned activity of the employee was in violation of the no-strike clause in the labor contract.[3] It was in this context that the Court held that there was no distinction between discharge and replacement.

I would hold that the employees here involved had the right to refuse to cross the picket line, that such refusal was protected activity in that it was the exercise of the right to assist another labor organization and a right guaranteed by Section 7 of the Act. Redwing Carriers Inc., 137 NLRB 1545, affirmed sub non Teamsters, Etc., Local U. No. 79 v. NLRB, D.C.Cir., 325 F.2d 1011. However, as the Board concedes, the right of the employees to engage in this protected activity was not unlimited, and under proper circumstances must yield to the respondent's right to continue the operation of his business. Here, the respondent's overriding right to keep its business in operation provided justification for the course he pursued —but it does not necessarily follow that respondent had the absolute right to refuse to be instate employees upon their timely and unconditional application made before their jobs had been filled with permanent replacements.

I believe that the protected activity here engaged in placed the four employees in a status similar to that of economic strikers. And although economic strikers may be permanently replaced, an employer may not permissibly refuse them reinstatement if they unconditionally apply therefor prior to the time their jobs have been

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permanently filled. Cf. Labor Board v. Mackay Co., 304 U.S. 383, 58 S.Ct. 904; N.L.R.B. v. J. Mitchko, Inc., 3 Cir., 284 F.2d 573; N.L.R.B. v. United Brass Works, Inc., 4 Cir., 287 F.2d 689.

In view of what I regard as controlling precedent I am satisfied that under the circumstances presented by this record, the Board properly found that the employees were entitled to reinstatement and that respondent's failure to recognize this right was violative of the Act.

Accordingly, I would grant enforcement of the Board's order in its entirety.

NLRB v. *Southern Greyhound Lines,* 426 F.2d 1299, (5th Circuit):

Before GOLDBERG, DYER and CARSWELL, Circuit Judges.

GOLDBERG, Circuit Judge:

The National Labor Relations Board here seeks enforcement of an order issued against Southern Greyhound Lines, Inc. Our basic problem revolves around the discharge of a conscientious confidential secretary with scruples against crossing a picket line. The difficulties which later culminated in the order began in March, 1967. The company was then engaged in negotiations with a union representing the porters, maids and janitors. Efforts to reach an agreement failed, the union called a strike, and on March 31 a picket line was set up around the Greyhound Lines' Miami terminal. Mrs. Virginia Anderson, the charging party herein, was the terminal manager's confidential secretary and as such was prohibited from membership in the union representing the other office workers. She, of course, was not a member of the striking union. Despite her lack of union member-

while the Supreme Court did not expressly hold that the involved employee had engaged in unprotected activity, it seems to me that this deduction is inescapable because of the Court's holding that the questioned activity of the employee was in violation of the no-strike clause in the labor contract.[3] It was in this context that the Court held that there was no distinction between discharge and replacement.

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ship, Mrs. Anderson refused to cross the picket line around the Miami terminal, stating that to do so would be against her principles. When Mrs. Anderson informed the manager of her intention not to cross the picket line, he discharged her "for failing to report for work as ordered." On April 21, Mrs. Anderson filed an unfair labor practice charge, asserting that the company had unlawfully terminated her employment on March 31 and had since refused to reinstate her.

The National Labor Relations Board held that Mrs. Anderson's refusal to cross the picket line was a protected activity and that her discharge was a violation of § 8(a) (1) of the National Labor Relations Act, 29 U.S.C.A. § 158(a) (1). The Board therefore ordered the company to offer Mrs. Anderson reinstatement and further ordered that she be paid back pay from the date the strike terminated until the company offered her reinstatement. The company resists compliance with the Board's order, asserting that it had a right to terminate Mrs. Anderson's employment because she was not engaged in a protected activity. Moreover, the company alleges that the back pay award was unjustified even if Mrs. Anderson's discharge was unlawful because she never offered unconditionally to return to work.

The relative rights and duties of an employee who refuses to cross a pick line and his employer who would require such a crossing as a condition of continued employment have been considered and settled with conflicting results in other circuits. Compare NLRB v. L. G. Everist, Inc., 8 Cir. 1964, 334 F.2d 312 and NLRB v. Illinois Bell Telephone Co., 7 Cir. 1951, 189 F.2d 124, cert. denied, 342 U.S. 885, 72 S.Ct. 173, 96 L.Ed. 663, with NLRB v. John Stepp's Friendly Ford, Inc., 9 Cir.

1964, 338 F.2d 833, Truck Drivers Union Local No. 413, etc. v. NLRB, D.C. Cir. 1964, 334 F.2d 539, and NLRB v. West Coast Casket Co., 9 Cir. 1953, 205 F.2d 902. In this circuit we have encountered parts of the problem, but we have never considered the problem in the wholistic form here presented. In NLRB v. Montag Bros., Inc. 5 Cir. 1944, 140 F.2d 730 this court affirmed without discussion a Board finding that it was an unfair labor practice to discharge non-union employees who had refused to cross a picket line at their employer's place of business. However, we did not there consider or discuss the basis of this protection or any right an employer might have to replace such an employee for legitimate business purposes. Later in NLRB v. Cone Brothers Contracting Company, 5 Cir. 1963, 317 F.2d 3, cert. denied, 375 U.S. 945, 84 S.Ct. 353, 11 L.Ed.2d 275, this court clearly implied that the employer may have some right to dismiss an employee who refuses to cross a picket line if dismissal is necessary "to preserve the efficient operation of an employer's business." 317 F.2d at 8. In *Cone,* however, we did not discuss the character or the extent of either the employee's or the employer's privileges in this area. We thus approach this problem knowing that this court in *Montag* recognized an employee's privilege to refuse to cross a picket line and in *Cone* recognized an employer's privilege in the same situation to preserve his business operations, but in neither case did we define the basis or the extent of these privileges. The question before us is therefore one of the balance to be struck between these two competing interests.

[1, 2] Initially, we think it obvious that when an employee, as a matter of principle, refuses to cross a picket line at his own employer's place of business, the em-

ployee, even though he is not a member of the striking union, has in effect plighted his troth with the strikers, joined in their common cause, and has thus become a striker himself. Teamster Local No. 413 v. NLRB, *supra;* NLRB v. West Coast Casket Co., *supra.* The basis of the protection against discharge afforded an employee who refuses to cross a picket line at his employer's business is his status as a striker. Such an employee is therefore entitled to all the protections due under the National Labor Relations Act to those strikers with whom he has joined cause. Conversely, the employer's right to discipline such an employee to preserve the operation of his business is limited to those measures which he could lawfully use against the strikers.

In the instant case Mrs. Anderson refused to cross a picket line established by the Amalgamated Transit Union, AFL-CIO—CLC representing the porters, maids and janitors, which was at that time engaged in a lawful economic strike against the company. She thus became an economic striker. Though Mrs. Anderson was not a member of that union and because of her confidential position could not be a member of the Office and Professional Employees International Union, AFL-CIO, which represented the other office workers and secretaries, she was not deprived of the protections furnished an employee under the National Labor Relations Act. NLRB v. Poultrymen's Service Corp., 3 Cir. 1943, 138 F.2d 204. Mrs. Anderson therefore was entitled to all of the protection due an economic striker, and the company had the correlative privilege to use those measures which under the National Labor Relations Act it could lawfully employ against economic strikers in order to continue its business operations.

[3] The respective rights of an economic striker and his employer were carefully surveyed by the Supreme Court in NLRB v. Fleetwood Trailer Co., Inc., 1967, 389 U.S. 375, 88 S.Ct. 543, 19 L.Ed.2d 614, where the Court said in relation to economic strikers:

> "Section 2(3) of the Act (61 Stat. 137, 29 U.S.C. § 152(3)) provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment. If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act (61 Stat. 140 and 151, 29 U.S.C. §§ 157 and 163). Under §§ 8(a) (1) and (3) (29 U.S.C. §§ 158(a) (1) and 3)) it is an unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice. NLRB v. Great Dane Trailers, 388 U.S. 26, 34, 1035, 87 S.Ct. 1792, 1798, 18 L.Ed.2d 1027 (1967). The burden of proving justification is on the employer. * * *" 389 U.S. at 378, 88 S.Ct. at 545.

It follows, therefore, that it was an unfair labor practice in the instant case for the company to discharge Mrs. Anderson for participation in an economic strike. She remained an employee under § 2(3) of the Act, 29 U.S.C.A. § 152(3), and was entitled to reinstatement at the termination of the strike unless the company had some substantial and legitimate business justification for denying her continued employment.

One recognized business justification for refusing to reinstate economic strikers occurs when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations. NLRB v. Mackay Radio & Telegraph Co., 1937, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381. There may be other justifications, but we need not here speculate on their nature and boundaries. It is clear that the burden of proving justification is on the employer. NLRB v. Fleetwood Trailer Co., Inc., *supra*. In the instant case the evidence is uncontradicted that Mrs. Anderson had not been permanently replaced at the time the strike was terminated, and the employer has alleged no other justification which we might consider. We therefore hold that Mrs. Anderson had a right to reinstatement at the termination of the strike.

Respondent, however, relying on NLRB v. Rockaway News Supply Co., 1952, 345 U.S. 71, 73 S.Ct. 519, 97 L.Ed. 832, alleges that in the context of an employee's refusal to cross a picket line, the Supreme Court has erased the well established distinction between the discharge of an economic striker—an unlawful action—and the employer's right to permanently replace such an employee—a lawful action. NLRB v. Fleetwood Trailer Co., *supra*. We do not read *Rockaway* as establishing such an all-inclusive principle. In the first place, the Court in *Rockaway* deliberately and unmistakably declined to give its opinion such as weeping effect, saying:

> "The parties here see the case as requiring decision of sweeping abstract principles as to the respective rights of employer and employee regarding picket lines. But this decision does not, and should not be read to, declare any such principles. The actual controversy here is within a

very narrow scope, * * *" 345 U.S. at 75, 73 S.Ct. at 522.

Moreover, the Court's decision in *Rockaway* was based on a no strike, no work stoppage clause in the employee's contract which the employee breached by refusing to cross a picket line. Finally, the picket line which the employee in *Rockaway* refused to cross was not around his own employer's premises but around the plant of a customer where the employee was required to make pickups and deliveries. It was in these circumstances that the Supreme Court remarked:

> "The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it." 345 U.S. at 75, 73 S.Ct. at 522.

We quite agree. In *Rockaway* no economic striker, whether he achieved that status by a refusal to cross a picket line or by the more conventional method, would have been engaged in a protected activity since the right to strike had been specifically foresworn in the collective bargaining agreement between the employee's union and the employer. Thus the employer was entitled to discharge the offending employee without regard to whether he had been permanently replaced.

In the instant case there was no such contractual negation of the employee's right to strike; the Court's decision in *Rockaway* is therefore inapplicable here. Furthermore, the Court has subsequently reaffirmedthe validity of the distinction between discharge and replacement in the context of a protected economic strike. NLRB v. Fleetwood Trailer, Inc., *supra*. In the circumstances of this case we find that the company's discharge of Mrs. Anderson was an unfair labor practice.

[4] Greyhound's next objection to the Board's order involves the back pay award. The company contends that because Mrs. Anderson never unconditionally offered to return to work after her discharge, the Board's award of back pay from the termination of the strike until the company offers her reinstatement is unjustified. We find no merit in this argument.

[5] Normally when a back pay award is made due to the employer's failure to reinstate a striker, the Board or the court orders that the back pay commence from the date such an employee unconditionally offers to return to work. See, e.g., J. H. Rutter-Rex Manufacturing Co., Inc. v. NLRB, 5 Cir. 1968, 399 F.2d 356, cert. denied, 393 U.S. 1117, 89 S.Ct. 993, 22 L.Ed.2d 122; NLRB v. Safway Steel Scaffolds Company of Georgia, 5 Cir. 1967, 383 F.2d 273, cert. denied, 390 U.S. 955, 88 S.Ct. 1052, 19 L.Ed.2d 1150; NLRB v. Holcombe, 5 Cir. 1963, 325 F.2d 508. From these authorities the company in the instant case attempts to extract the universal principle that such an offer is the sine qua non of a back pay award. We think there is no such general rule requiring in every case an unconditional offer to return to work before a back pay award is justified.

In the normal strike situation there is no direct communication before or during the strike between the employer and an individual employee concerning the employee's work status. The customary offer to return to work notifies the employer that the strike is over and that the employees are ready to resume work. The time of the offer therefore becomes the appropriate time to commence any back pay award since an employee is not entitled to back pay for the time he was on strike. The entire rationale surrounding the employee's usual offer

to return to work is grounded on the fact that the employee was the source of his own disemployment. He refused to work; his employer did not fire him.

[6] Here an entirely different situation exists. Mrs. Anderson had been permanently discharged at the beginning of the strike. She therefore had no reason to notify the company at the end of the strike that she was ready to resume work. The company had already notified her that it no longer desired her services. An application for reinstatement would have been a completely useless ritualistic act. It is this distinction which has given rise to the rule that the company itself must affirmatively offer reinstatement to an unlawfully discharged employee, regardless of whether or not the discharged employee makes application for reinstatement. G.P.D. Inc. v. NLRB, 6 Cir. 1969, 406 F.2d 26, n. 6; Bituminous Material & Supply Co. v. NLRB, 8 Cir. 1960, 281 F.2d 365; NLRB v. Cowell Portland Cement Co., 9 Cir. 1945, 148 F2d 237, cert. denied, 326 U.S. 735, 66 S.Ct. 44, 90 L.Ed. 438; Indaho Potato Growers, Inc. v. NLRB, 9 Cir. 1944, 144 F.2d 295, cert. denied, 323 U.S. 769, 65 S.Ct. 122, 89 L.Ed. 615; New York Handkerchief Mfg. Co. v. NLRB, 7 Cir. 1940, 114 F.2d 144, cert. denied, 311 U.S. 704, 61 S.Ct. 170, 85 L.Ed. 457; NLRB v. Sunshine Mining Co., 9 Cir. 1940, 110 F.2d 780, cert. denied, 312 U.S. 678, 61 S.Ct. 447. 85 L.Ed. 1118. Mrs. Anderson was unlawfully discharged. The company therefore had an affirmative duty to offer her reinstatement, but it did not do so. She was entitled to such an offer at the termination of the strike, and her right to back pay commenced at that time despite the fact that she did not apply for reinstatement.

For the foregoing reasons the order of the Board is enforced.

NLRB v. *Difio Laboratories, Inc.*, 427 F.2d 170 (6th Circuit

Before WEICK, EDWARDS and COMBS, Circuit Judges.

PER CURIAM.

The National Labor Relations Board here petitions for enforcement of its order, finding that the company had violated § 8(a) (1) of the National Labor Relations Act, 29 U.S.C. § 158(a) (1) (1964), by threatening "disciplinary" measures against strikers and by firing two of the persons who honored a picket line conducted by the United Automobile Workers. Neither of the persons discharged was a member of the UAW, but both were members of the Oil, Chemical & Atomic Workers Union and one was steward for that union in the laboratory of the struck plant where both worked.

Respondent claims that there is no showing of anti-union bias on the part of the company, either in the language used or in the two discharges, and argues that the two discharges were justified by the prior absences of one of the employees and by the abrupt departure from work of the other.

[1] There was, however, substantial evidence from which the Board could have found that both discharges were directly related to these two employees' refusal to cross the United Automobile Workers picket line and that since respondent was "primary employer" of all of the employees involved, the discharges resulted from concerted activity protected by the NLRA.

In Houston Insulation Contractors Ass'n v. NLRB, 386 U.S. 664, 87 S.Ct. 1278, 18 L.Ed.2d 389 (1967), the Supreme Court said:

> *National Woodwork Mfrs., supra,* [386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed. 2d 357 (1967)] holds that collective activity by employees of the primary employer, the object of which is to affect the labor policies of that primary employer, and not engaged in for its effect elsewhere, is protected primary activity. 'Congress was not concerned to protect primary employers against pressures by disinterested unions, but rather to protect disinterested employers against direct pressures by any union.' The finding of the Board, supported by substantial evidence, was that Local 113's object was to influence Armstrong in a dispute with Armstrong employees, and not for its effect elsewhere." Houston Insulation Contractors Ass'n v. NLRB, *supra* 386 U.S. at 668, 87 S.Ct. at 1281. (Footnote omitted.)

[2] Nonetheless, respondent contends that under the circumstances of this case, it had a right as an employer to require these two employees, who were not members of the union which struck and picketed at respondent's plant, to cross the picket line on pain of discharge for failure to do so. This court has previously dealt with essentially the same contention in NLRB v. City Yellow Cab Co., 344 F.2d 575 (6th Cir. 1965), wherein we said:

> "The cabdrivers testified that they went on strike and engaged in picketing because they were in sympathy with the demand of the switchboard operators for recognition. The Act protects the rights of employees 'to engage in * * * concerted activities for the purpose of * * * mutual aid or protection.' 29 U.S.C. § 157. N.L.R.B. v. Halsey W. Taylor Company, 342 F.2d 406 (C.A. 6, March 3, 1965).

"As said by Judge Learned Hand in N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505 (C.A. 2):

> " 'Certainly nothing elsewhere in the act limits the scope of the language to "activities" designed to benefit other "employees"; and its rationale forbids such a limitation. When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.'

See also N.L.R.B. v. Greensboro Coca Cola Bottling Co., 180 F.2d 840 (C.A. 4); N.L.R.B. v. Schwartz, 146 F.2d 773 (C.A. 5)

"In NLRB v. Guernsey-Muskingum Electric Co-op, Inc., 285 F.2d 8, 12 (C.A. 6), this court quoted with approval the following language from N.L.R.B. v. Phoenix Mutual Life Insurance Co., 167 F.2d 983, 6 A.L.R.2d 408 (C.A. 7), cert. denied, 335 U.S. 845, 69 S.Ct. 68, 93 L.Ed. 395:

> " 'A proper construction is that the employees shall have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining be contemplated * * * [and] a legitimate interest in acting concertedly in making known their views to management without being discharged for that interest.'

See also Salt River Valley Water Users' Association v. N.L.R.B., 206 F.2d 325 (C.A. 9); Anno-

tation, 19 A.L.R.2d 566." NLRB v. City Yellow Cab Co., *supra* 344 F.2d at 582.

In our view the two cases cited above control decision in the instant case and support the findings and order of the Board. *See also* NLRB v. Southern Greyhound Lines, 426 F.2d 1299 (5th Cir. 1970). Decided 4/20/70).

[3] Finally, whether the UAW did or did not want the two discharged employees to strike obviously has no bearing on their right to do so if they considered such action to be in their own best interest.

Enforcement of the Board's order is granted.

In the Supreme Court of the United States

OCTOBER TERM, 1970
No. 1742

UNION CARBIDE CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is not yet officially reported. The Board's decision and order (Pet. App. 10a–35a) are reported at 174 NLRB No. 147.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a–10a) was entered on March 2, 1971. The petition for a writ of certiorari was filed on May 24, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the employer violated Section 8(a)(1) of the National Labor Relations Act by discharging

428-394—71——1

employees in one department for refusing to cross a lawful picket line established at the employer's premises by his striking employees in another department.

2. Whether the Board properly found that the jobs of the discharged employees had not been eliminated.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pages 2–3 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner manufactures chemicals at two plants ("South Charleston" and "Institute") in the Charleston, West Virginia area. It also operates in that area a "Technical Center" at which it employs craftsmen and laborers who perform the construction and installation work at its production plants. (Pet. App. 12a–14a.) These employees are not represented by a labor union. Following unsuccessful negotiations with the Company regarding a new contract, the production and maintenance employees of the South Charleston plant, represented by the International Association of Machinists, called an economic strike to commence at midnight, July 24, 1967. These employees began picketing the plant the next day, July 25. (Pet. App. 15a, 16a; A. 55, 113.) [1]

[1] "A." refers to the Appendix to the briefs in the court below.

Anticipating the strike, the Company, on July 24, called together the construction department employees who were working at the South Charleston plant, in an attempt to persuade them to continue working there. Supervisors read a statement ("the Tailgate Message") to groups of these employees, which warned that they were expected to work even though the plant was struck, and that failure to do so would subject them to "disciplinary action." The statement also informed them which gates to use during the strike. (Pet. App. 15a–16a; A. 113–114, 169.) In addition to reading the statement, the supervisors advised the construction department employees that, if picket line violence occurred, each individual employee would be "responsible for his own welfare" and that, if they did not cross the picket lines, they would be subject to discharge (A. 35–36, 64–65, 89).

The Company also instructed its supervisors to make contact with an employee after three days of absence and attempt to convince him to return to work in order to avoid disciplinary action. After five days of absence, the employee would be sent a letter warning him of probable discharge if he remained absent from work for a period of four more days; after nine days of absence, he would be notified that he was discharged. (Pet. App. 17a–18a; A. 114–115.)

On the morning of July 25, employees Elza Moss (a pipe welder with six years seniority), Henry Mullins (a journeyman pipefitter with eight years seniority), and Alan Withrow (an apprentice pipefitter) appeared at the gates to the South Charleston

plant in order to report for work. They found the gates being picketed by the IAM production and maintenance employees, and each of them decided not to cross the picket line. (Pet. App. 16a; A. 38–39, 65–66, 89–90.) Moss did not enter the plant because he was "afraid" and because it was a matter of "principle," having "never crossed a picket line in [his] life" (Pet. App. 16a; A. 58–59, 60). He returned home, and called the plant to advise that he would not be working that day because of the picket line (Pet. App. 17a; A. 38–39). Moss continued to report to work at various times thereafter, but each time he encountered the picket line, returned home, and then notified the Company by telephone that he could not work because of the picket line (Pet. App. 17a; A. 39–40). Withrow decided not to cross the picket line "as a matter of principle," and Mullins, because it was "dangerous" (Pet. App. 16a; A. 84–85, 92, 98–99). They, too, notified the Company that they were unable to work because of the picket line and continued this procedure on succeeding days while the picket line was in front of the plant (Pet. App. 17a; A. 67–69, 77–82, 90–91, 99–100).

Thereafter, the Company, as planned, phoned and sent letters to the absent employees,[2] including Moss, Mullins and Withrow, advising them that it would

[2] When the strike began on July 25, approximately 109 construction employees out of the 425 then assigned to work at South Charleston were absent. By the ninth day, the number of absentees had dwindled to about 11, including Moss, Mullins and Withrow. All 11 were ultimately discharged. Only Moss, Mullins, and Withrow, however, filed charges with the Board. (Pet. App. 12a, 18a; A. 116, 120.)

regard their continued absence from work "as terminating your employment with Union Carbide" (Pet. App. 18a–19a; A. 170, 173, 175). Moss requested vacation leave, leave of absence without pay, or a transfer to Company jobs other than at the South Charleston plant. All these requests were refused (Pet. App. 19a; A. 41–42). Withrow asked for a "leave of absence" and was similarly refused (A. 70–71).

Thereafter, by letters dated August 10 and 11, 1967, the Company advised Moss that he had been "removed from the payroll" and that money owed him would be forwarded to him (Pet. App. 19a; A. 171–172). Mullins called the Company on August 7, and was told that he had been "terminated" (A. 93, 176).

On October 8, 1967, the strike ended at the South Charleston plant and the picket lines were removed (Pet. App. 19a). Employee Withrow immediately returned to the plant and requested reemployment. The Company informed him that, since he had failed to report for work following receipt of the letter warning of possible discharge, he "was fired." He was also told that he could reapply for employment but that he would have to "start back in the labor gang and work [his] way back up with no seniority * * *." Withrow refused and left. (Pet. App. 20a; A. 73–76.)

B. THE DECISIONS BELOW

The Board held that, in respecting the picket line of their fellow employees, Moss, Mullins, and Withrow were engaged in concerted activity protected by Section 7 of the Act; and that the Company violated Section 8(a)(1) of the Act by threatening to discharge,

and then actually discharging, them for engaging in such activity (Pet. App. 21a–23a, 28a–29a, 34a). The Board rejected the Company's alternative contention that, even if the activity were protected, it was not required to reinstate the three employees because their jobs had been eliminated. The Board found that, although the Company had a policy of decreasing its work force by "normal attrition," the unlawful discharge of the three employees did not result from such attrition. (Pet. App. 26a–27a, 34a.) The Board ordered the Company, *inter alia,* to reinstate the three employees and to make them whole for any loss of pay from the date the strike was terminated (Pet. 34a).

The court of appeals (with Judge Bryan dissenting) enforced the Board's order except as to Mullins. The court held that, since Mullins testified that he refused to cross the picket line because of "fear," he was not making common cause with the strikers; therefore his refusal was not activity protected by Section 7. (Pet. App. 4a–5a, 9a.)

ARGUMENT

1. The holding of the court below that employees Moss and Withrow were engaged in activity protected by Section 7 of the National Labor Relations Act when they refused to cross the picket line established by their fellow employees is correct and does not warrant further review. "Primary employees have traditionally been assured the right to take concerted action against their employer to gain the 'mutual aid or protection' guaranteed by § 7 of the * * * Act. * * *

whether or not the resolution of the particular dispute directly affects all of them." *Houston Insulation Contractors* v. *National Labor Relations Board,* 386 U.S. 664, 668. Thus, when an employee in one bargaining unit refuses to cross a picket line maintained against his employer by fellow employees in another bargaining unit, he "has in effect plighted his troth with the strikers, joined in their common cause, and has thus become a striker himself." *National Labor Relations Board* v. *Southern Greyhound Lines,* 426 F. 2d 1299, 1301 (C.A. 5). Accordingly, just as with any other striking employee, the employer, in the interest of running his business, may permanently replace the sympathy strikers, but may not discharge or take other reprisals against them. See *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 347; *National Labor Relations Board* v. *Fleetwood Trailer Co.,* 389 U.S. 375, 379.

The holding of the court below is in accord with that of other courts of appeals in similar factual situations. *Southern Greyhound Lines, supra* (C.A 5); *National Labor Relations Board* v. *Difco Laboratories,* 427 F. 2d 170 (C.A. 6), certiorari denied, 400 U.S. 833.[3] *National Labor Relations Board* v. *Rockaway*

[3] In *National Labor Relations Board* v. *Illinois Bell Telephone Co.,* 189 F. 2d 124 (Pet. 5), the Seventh Circuit held that employee refusals to cross a picket line were unprotected. However, the court relied, in part, on the fact that the employees who refused were acting in defiance of their union representative. See *Harnischfeger Corp.* v. *National Labor Relations Board,* 207 F. 2d 575, 580 (C.A. 7). No similar problem exists here. Moreover, insofar as *Illinois Bell* may be deemed to hold that such refusals constitute individual, rather than concerted,

News Supply Co., 345 U.S. 71, and *National Labor Relations Board* v. *L. G. Everist*, 334 F. 2d 312 (C.A. 8) (Pet. 5, 7), involve the right of an employer to discharge employees who refuse to cross a picket line at *another* employer's premises; employees in this situation are more vulnerable to discharge by their employer, because the mutuality of their interest and that of the strikers is more remote. See *Truck Drivers Local 413* v. *National Labor Relations Board*, 334 F. 2d 539, 543–544 (C.A. D.C.).

2. Petitioner's contention that, in any event, it was not required to reinstate Moss and Withrow because their jobs were eliminated brings into question a factual finding which does not warrant further review. The Board found that, although the Company had a policy at the time of the discharges of not replacing employees who *voluntarily* quit, no employees were being laid off (*supra*, p. 6). Accordingly, the Board reasonably concluded that, had the employees not been unlawfully discharged, their jobs would have continued.

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activity, the Seventh Circuit has subsequently rejected that view. See *National Labor Relations Board* v. *John S. Swift Co.*, 277 F. 2d 641, 646 (C.A. 7).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1742~~ 70-200

UNION CARBIDE CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF TO THE BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

Respondent's brief in opposition to the petition for a writ of certiorari raises for the first time two arguments to which your petitioner feels a reply should be made. Respondent first argues that there is no conflict between the circuits because the decisions cited by Petitioner as being in conflict with the decision of the Court of Appeals in this case are factually distinguishable or have been "rejected" by later decisions. (Res. Br., p. 7, n. 3). Respondent's second new argument is that the Board found as a fact that "had the employees not been unlawfully discharged, their jobs would have

continued" (Res. Br. p. 8), and that there arises no question of law as to whether the Court properly ordered the employees' re-instatement with back pay despite the Company's uncontroverted evidence that it had no need for the employees' services at the end of the strike. Both arguments are without merit.

ARGUMENT

I. THERE IS A REAL CONFLICT BETWEEN THE CIRCUITS

Petitioner cites *NLRB* v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (7th Cir.) cert. den'd 342 U.S. 885, and *NLRB* v. *L. G. Everist, Inc.*, 334 F.2d 312 (8th Cir.), as representing its side of the conflict between the circuits on the first question presented by the petition (Pet. p. 2, 5). Respondent argues that *Everist* is distinguishable, in that the picketing there occurred on the premises of another employer, and that this distinction is significant because "employees in this situation are more vulnerable to discharge by their employer, because the mutuality of their interest and that of the strikers is more remote." (Res. Br., p. 8). It is urged by petitioner that this argument does not bear analysis. The mutuality of interest between strikers and workers asked to cross their picket lines is not a function of the location of the picket line. Quite often, unions representing different groups working for the same employer are in competition for membership or the employer's labor dollars. Likewise, nonstriking workers often have interests in common with striking employees of a different employer. The facts in this case are that Moss and Withrow, as the discharged employees in *Everist*, had no direct interests in common with the strikers. Therefore the "distinction" asserted between *Everist* and this case is without significance.

Respondent asserts that *Illinois Bell* is distinguishable in that the discharged employees there were members of a labor union, and that the refusal to cross the picket line was, in that case, "in defiance of their union representative." (Res. Br., p. 7, n. 3). The fact in *Illinois Bell* was merely that the employees' actions were not organized and approved by their union; and this fact was pointed out by the Court of Appeals for the Seventh Circuit to emphasize that the employees who refused to cross the picket line were not serving any legitimate purpose of their own. As the Court said:

> "* * * such refusal was not for the mutual aid or protection of the employees involved. It could have only been for the benefit and aid of those in a different bargaining unit, the representative of which could not have represented the involved employees and, consequently, could have obtained nothing from respondent for their benefit."

That is the exact circumstance in this case. The "distinction" pointed out by Respondent has no significance.

Finally, Respondent argues that *Illinois Bell*, to the extent that it holds that employees who refuse to cross a picket line out of principle do so as a personal matter rather than in concert with each other, has since been "rejected" by the Seventh Circuit Court of Appeals in *NLRB* v. *John S. Swift Co.*, 277 F. 2d 641 (7th Cir.). In *Swift* the charging parties "respected" a picket line of employees who were discharged by their common employer for refusal to work overtime, and were held to have done so to protest that discharge. Obviously the employees in that case did not honor the picket line out of personal principle, but did so with the object of seeking the re-employment of fellow members of their

own bargaining unit who had been discharged for violation of a rule which affected not only the pickets, but also those who honored the picket line. A simple reading of *Swift* shows that it casts no doubt upon the continuing authority of *Illinois Bell* as representing the Seventh Circuit's position in a case such as the instant case.

II. THE PROPRIETY OF THE BOARD'S ORDER GRANTING REINSTATEMENT WITH BACK PAY IS A QUESTION OF LAW

Respondent argues that there is no reviewable question as to the propriety of the Board's Order granting reinstatement with back pay, because the Board allegedly made a "finding of fact" that "had the employees not been unlawfully discharged, their jobs would have continued." Petitioner submits that the Board's Order, enforced by the Court of Appeals, granting reinstatement with back pay, does not depend upon the resolution of any question of fact, but upon a conclusion as to the law applicable to the undisputed facts. The Court of Appeals correctly found that "the basic facts are not in dispute." (Petition. App. p. 2a). The basic and uncontroverted facts are that upon the termination of the employment of Moss and Withrow the petitioner absorbed their working duties into the remaining work force. At the conclusion of the strike Petitioner had no need for Moss' and Withrow's services, as the work previously performed by them was being performed by other employees and the work demands of the Petitioner were continuing to decline. The Board and the Court of Appeals held, nevertheless, that because the Petitioner had not hired replacements for Moss and Withrow at the time of their discharge, but had absorbed

their work into the remaining work force during a time of declining overall work demands, the Petitioner had placed itself "in the untenable position of contending that the illegal discharges of July, 1967, provided an economic justification for refusal to reinstate the employees in October, 1967." (Pet. p. 6a, 7a).

The last above quoted holding of the Board and the Court of Appeals rests upon a distinction, between discharge and replacement, and between replacement and absorption, which has no basis in either fact or law. In the words quoted by Judge Bryan, from *NLRB* v. *Fleetwood Trailer, Inc.*, in his dissent in this case, such a holding in the context of these facts, "puts too fine a point" upon the difference between discharge and replacement, and replacement and absorption of the remaining work. (Pet. App. p 7a). Under the rationale of the Board and the Court of Appeals in this case, reinstatement and back pay would have been denied Moss and Withrow had the Petitioner replaced them with new employees, instead of discharging them and having their work absorbed by the remaining employees. Petitioner submits that the distinction thus made by the Board and the Court of Appeals should be held invalid. To so hold, it is not necessary that this Court overturn any finding of fact made by the Board; but only that it reject the Board's and Court of Appeal's conclusion of law based upon the aforementioned invalid distinction.

CONCLUSION

For the reasons set forth in its petition, which, as shown above, have not been materially contested by Respondent, the petition for certiorari should be granted.

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